

# **“PLAYING CHICKEN”: AN INSTANT HISTORY OF THE BATTLE OVER EXCEPTIONS TO CLIENT CONFIDENTIALITY**

by Michael Ariens\*

## **I. INTRODUCTION**

In August 2001, the American Bar Association’s (ABA) House of Delegates rejected two of three proposed amendments to Model Rule of Professional Conduct 1.6 creating exceptions to the duty of client confidentiality.<sup>1</sup> The ABA’s Commission on Evaluation of Professional

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<sup>1</sup>*See House of Delegates Proceedings*, 126:2 A.B.A. Rep. 13, 37 (2001). Technically, the House adopted one amendment and rejected one amendment, Prop. Model Rules Prof. Cond. 1.6(b)(2). After it rejected Proposed Model Rule 1.6(b)(2), the Ethics 2000 Commission withdrew Prop. Model Rules Prof. Cond. 1.6(b)(3). Model Rule 1.6(b)(1) was amended to state: “to prevent reasonable certain death or substantial bodily harm.” *See Report of the Commission on Evaluation of the Rules of Professional Conduct*, 118:2 A.B.A. Rep. 257, 308 (2001)(quoting language of amendment to Model Rule 1.6(b)(1)). *See generally* Mark Hansen, *Let the Debate Begin: Report on ABA ethics rules is ready for the House*, ABA J., August 2001, at 80 (reporting “[e]xtensive debate is likely to take place over the commission’s proposed changes to Model

Standards (Ethics 2000 Commission) had urged the House of Delegates to permit a lawyer to disclose a client confidence a) “to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer’s services,” and b) “to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud in

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Rule 1.6”); Mark Hansen, *Model Rules Rehab*, ABA J., October 2001, at 80 (reporting action of House of Delegates regarding amendments to Model Rule 1.6 at August 2001 Annual Meeting). The ABA publishes a record of its actions at its midyear and annual meetings. It has, for reasons that remain unclear to me, not published its 2003 volume. Before the amendment in adopted in August 2001, Model Rule 1.6 was as follows:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client.

furtherance of which the client has used the lawyer's services.”<sup>2</sup> Two years later, these same rejected amendments to Model Rule 1.6 were adopted by the ABA House of Delegates.<sup>3</sup> The ABA's stunning turnaround concerning when client confidences may be disclosed was the culmination of a chaotic two-year battle among the ABA and Congress, the Securities and Exchange Commission (SEC) and even the Department of Justice (DOJ) involving efforts to define the role lawyers should play in protecting third parties from financial harm by a client of the lawyer.

This battle commenced in earnest with the collapse in Fall 2001 of Enron, followed the next spring and summer by the bankruptcy of several other large corporations and the indictment of several officers of publicly-held corporations. As these companies imploded in a wave of accounting scandals, the ABA attempted to head off federal regulation of the conduct of lawyers representing publicly-traded companies. Failing to do so, the ABA began both to appear to capitulate to Congress and to attempt to preserve its authority as setting the standards of professional conduct. In July 2002, the ABA's Task Force on Corporate Responsibility, created in March, issued a preliminary report urging the ABA to reconsider its rejection in August 2001 of the amendments to Rule 1.6. More importantly, the Task Force recommended that such

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<sup>2</sup>*See Report of the Commission on Evaluation of the Rules of Professional Conduct*, 118:2 A.B.A. Rep. 257, 308 (2001). *See also* James Podgers, *The Non-Revolution*, ABA J., October 2003, at 80 (reporting adoption of amendments two years after initial rejection).

<sup>3</sup>*See* James Podgers, *The Non-Revolution*, ABA J., October 2003, at 80.

disclosures of client confidences be made *mandatory*, not just discretionary with the lawyer.<sup>4</sup> The House of Delegates had in 2001 refused to amend its rules even to *permit* lawyers to disclose client confidences in such cases.

The action of the House of Delegates in August 2001 was not exceptional. Since the adoption of the Model Rules by the ABA in 1983, it had rejected previous efforts to expand the number of permissive disclosures of client confidences, and had never mandated any disclosure of any client confidence,<sup>5</sup> including a confidence in which a client indicated a friend planned to kill a third party. This extraordinary about face by the ABA was a consequence of action by the Executive and, more importantly, Congress in early July 2002. On July 9, 2002, the President by executive order created within the DOJ a Corporate Fraud Task Force.<sup>6</sup> Six days later, the Senate

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<sup>4</sup>*See Preliminary Report of the American Bar Association Task Force on Corporate Responsibility*, 58 Bus. Law. 189, 206 (2002).

<sup>5</sup>The closest the Model Rules came to mandating disclosure of a client confidence is found in Model Rule 3.3(a)(4) and 3.3(b), which together required a lawyer offering evidence before a tribunal to disclose a client confidence if a lawyer offered evidence that the lawyer later learned was false. At the ABA's 2002 Midyear Meeting in February, Model Rule 3.3 was amended to clarify the duty of the lawyer to disclose client confidences in order to prevent any person from engaging in criminal or fraudulent conduct "related to the proceeding." *See House of Delegates Proceedings*, 127:1 A.B.A. Rep. 22 (2002). *See* Model Rule Prof. Cond. 3.3(b) (2008).

<sup>6</sup>*See* Exec. Order No. 13,271, 67 Fed. Reg. 46,091 (July 9, 2002), *available at*

voted to order the SEC to adopt within 180 days rules regulating lawyer conduct, which became part of the Sarbanes-Oxley Act of 2002 enacted on July 30, 2002.<sup>7</sup>

In Fall 2002, the ABA awaited the issuance of proposed rules governing lawyer conduct by the SEC. In November, the SEC did so. The SEC's final rules were issued on January 29, 2003. When the ABA Task Force released its final report on March 31, 2003, it was able both to piggyback the SEC's rules and assuage public discontent by again recommending the amendments to Model Rules 1.6, but now it recommended such disclosures be made *permissive*, not mandatory.<sup>8</sup> The ABA attempted to gain the public high ground by adopting the Task Force's recommendation and amending Rule 1.6 in August 2003.<sup>9</sup>

In the aftermath of the Enron bankruptcy filing on December 2, 2002, the DOJ issued the Thompson Memorandum in early January 2003.<sup>10</sup> The Thompson Memorandum was a product

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<http://www.usdoj.gov/dag/cftf/execorder.htm> (last visited July 31, 2008).

<sup>7</sup>Pub. L. 107-204, 116 Stat 745 (July 30, 2002), at § 307.

<sup>8</sup>*See Report of the American Bar Association Task Force on Corporate Responsibility*, 59 Bus. Law. 145, 174 (2003). Given the charge of the Task Force, it made recommendations concerning other provisions of the Model Rules.

<sup>9</sup>*See* Model Rules Prof. Conduct 1.6(b)(2) & 1.6(b)(3) (2008). *See also* James Podgers, *The Non-Revolution*, ABA J., October 2003, at 80 (reporting action of ABA adopting amendments).

<sup>10</sup>Memorandum from Deputy Attorney General Larry D. Thompson to Heads of

of the Corporate Fraud Task Force and supplanted the Holder Memorandum issued by the DOJ in 1999.<sup>11</sup> Both Memorandums concerned the factors evaluated before deciding whether to indict a corporation. The Holder Memorandum indicated that one factor in reaching a decision was “[t]he corporation’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of the corporate attorney-client and work product privileges.”<sup>12</sup> The Holder Memorandum later declared that although “often critical in enabling the government to evaluate the completeness of a corporation’s voluntary disclosure and cooperation,” waiver of the privilege by a corporation was not “an absolute requirement, and prosecutors should consider the willingness of a corporation to waive the privileges when necessary to provide timely and complete information as only one factor in evaluating the corporation’s cooperation.”<sup>13</sup> The Thompson Memorandum simply reiterated the Holder Memorandum regarding the waiver of the attorney-corporate client

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Department Components, United States Attorneys re Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003), *available at* [http://www.usdoj.gov/dag/cftf/corporate\\_guidelines.htm](http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm) (last visited July 31, 2008)[hereinafter Thompson Memorandum].

<sup>11</sup>Memorandum from Deputy Attorney General Eric Holder to All Component Heads and United States Attorneys re Bringing Criminal Charges Against Corporations, *available at* <http://www.usdoj.gov/criminal/fraud/docs/reports/1999/chargingcorps.html> (last visited July 31, 2008)[hereinafter Holder Memorandum].

<sup>12</sup>*See id.* at 3.

<sup>13</sup>*See id.* at 7.

privilege and work product protection.<sup>14</sup> After fending off the SEC, the ABA and the DOJ from 2004 through 2008 battled over the meaning and interpretation the Thompson Memorandum and its successor, the McNulty Memorandum.<sup>15</sup> In this second battle, the ABA charged that the DOJ (and other federal agencies) had eroded the attorney-corporate client privilege, thus imperiling fundamental rights. As the contestants found themselves with greater or lesser power during this time, each adjusted its position on exceptions to client confidentiality accordingly, appearing attentive more to relative positions of power than concerns of policy and principle.

The purpose of this essay is to offer a pointillist history of this recent fight about when lawyers may or must disclose client confidences, and claims that the government was attacking the attorney-client privilege. In doing so, I hope to explain how this battle is representative of the current drift in the American legal profession.

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<sup>14</sup>Section VI of both memoranda are nearly identical, other than one additional paragraph in the Thompson Memorandum that included as a factor “whether the corporation, while purporting to cooperate, has engaged in conduct that impedes the investigation ....” *Thompson Memorandum* at 6.

<sup>15</sup>*See* Memorandum from Deputy Attorney General Paul J. McNulty to Heads of Department Components, United States Attorneys re Principles of Federal Prosecution of Business Organizations (Dec. 12, 2006) *available at* [http://www.usdoj.gov/dag/speeches/2006/mcnulty\\_memo.pdf](http://www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf) (last visited July 31, 2008)[hereinafter McNulty Memorandum].

Section II traces the ABA's often schizophrenic understanding of the duty of confidentiality and exceptions to that duty from the 1908 Canons of Ethics to the adoption by the ABA of the 1969 Code of Professional Responsibility, and the re-conceptualization of that duty found in the adoption in 1983 of the Model Rules of Professional Conduct. The ABA's re-conceptualization occurred after the discussion of the attorney-client privilege and its exceptions proposed by the drafters of the Federal Rules of Evidence between 1969 and 1973. The consonance between the 1969 Code and the 1975 Federal Rules of Evidence<sup>16</sup> concerning the limits of the duty of confidentiality was shredded in the reaction to the ABA's Discussion Draft of the Model Rules in January 1980. The drafts and debates concerning what became Model Rule 1.6 offer an initial demonstration of "playing chicken" by assorted lawyer interest groups as well as by the ABA, as exceptions to the duty of confidentiality became more narrowed, a narrowing justified by a claim that lawyers owe a nearly unfettered duty of loyalty to clients. Section III examines why states largely rejected Model Rule 1.6 between 1983 and the late 1990s and describes several corporate scandals from the late 1980s involving lawyer (mis)conduct. Section IV offers an instant history of the debate over when a lawyer may disclose client confidences in light of the Enron *et al.* scandals and the ABA's charge that the federal

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<sup>16</sup>The first draft of the Federal Rules of Evidence was published in 1969, with revised drafts published in 1970 and 1971. A third draft was published in 1972. *See* Michael Ariens, *Progress Is Our Only Product: Legal Reform and the Codification of Evidence*, 17 L. & Soc. Inq. 213, 252 (1992). The Act adopting the Federal Rules of Evidence was signed into law by President Gerald Ford on January 2, 1975, and made effective July 1, 1975. *See* Rules of Evidence, Pub. L. 93-595, 88 Stats. 1296 (1974).



government was engaged in a concerted attack on the attorney-client privilege. Section V offers a conclusion, and an Appendix offers a timeline of the events discussed in this paper.

## **II. UPPING THE ANTE IN THE MAKING OF THE MODEL RULES**

### *A. Beginnings*

The ABA's 1908 Canons of Ethics, 32 in number, did not include a provision requiring lawyers to protect client confidences. However, when the ABA adopted its Canons of Ethics, it also adopted an oath of admission. One of the seven oaths stated, "I will maintain the confidence and preserve inviolate the secrets of my client."<sup>17</sup>

Twenty years later, the ABA supplemented its original Canons. One of the 13 Canons added by the ABA was Canon 37, titled "Confidences of a Client." Canon 37 spoke less about the substance of the lawyer's duty to maintain confidences or the definition of "confidences" than the contours of that duty. It noted that the duty extended after the client-attorney relationship ended, that the duty extended beyond the lawyer to the employees of the lawyer, and that the lawyer may not use such confidences for his private advantage. The duty to keep a client's confidences did not extend to 1) "disclosing the truth" when the lawyer was falsely

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<sup>17</sup>*See Final Report of the Committee on Code of Professional Ethics*, 33 A.B.A. Rep. 567, 585 (1908).

accused by his client, or 2) when the client “announced [his] intention” “to commit a crime.”<sup>18</sup> In addition, Canon 41, adopted by the ABA at the same time, stated that “[w]hen a lawyer discovers that some fraud or deception has been practiced, which has unjustly imposed upon the court or a party, he should endeavor to rectify it.”<sup>19</sup>

The manner in which Canons 37 and 41 worked (together or separately) was unclear, and the extent of its application was wholly vague. The passive language in Canon 41, concerning the situation when “some fraud or deception has been practiced,” omitted listing the “whom” who had engaged in such conduct. Did the lawyer’s duty extend to fraud committed by a client, or merely third parties? Associated lawyers? Anyone else? Those against whom the fraudulent or deceptive conduct had taken place was limited by Canon 41 to “the court or a party.” Did that mean the lawyer had no duty to disclose a fraud against a third person not a party to the matter for which the lawyer served as counsel? Was “party” limited to those engaged in litigation, making the fraud against a person in a non-litigation context (such as a commercial transaction) impermissible to disclose? By stating the lawyer “should endeavor to rectify it,” Canon 41 appeared to speak in the language of discretion, and not as a mandate (“must”) upon the lawyer. Was that the intended meaning of the Canon?

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<sup>18</sup>*See Report of the Special Committee on Supplements to the Canons of Professional Ethics*, 53 A.B.A. Rep. 495, 497 (1928).

<sup>19</sup>*See Report of the Special Committee on Supplements to the Canons of Professional Ethics*, 53 A.B.A. Rep. 495, 498 (1928).

The interplay of Canons 37 and 41 was not assessed until 1953, when the ABA Committee on Professional Ethics and Grievances issued Formal Opinion 287. Opinion 287 applied Canons 37 and 41 to two separate fact situations. In the first case, after a lawyer aided a client in obtaining a divorce, the lawyer learned that the client had lied to the court. Does a lawyer have a duty to rectify this past fraud upon the court? In the second fact situation, a judge wrongly assumes the convicted client has no past criminal record, and states so in open court. The criminal defense lawyer knows the judge is in error. Does the lawyer have a duty to correct the judge's misapprehension? Relatedly, did the lawyer's duty, if any, change if the judge specifically asked the lawyer if the convicted client has a criminal record? A divided Committee (4 in favor, 1 concurring and dissenting in part, and 2 dissenting) concluded that, in the first case, the lawyer could not disclose the lie by the divorce client to the court because the lie did not come within the "crime-fraud" exception to the attorney-client privilege and thus remained a confidence protected under Canon 37. The Committee interpreted Canon 41 as applying to a case such as "a civil suit, [in which] the lawyer's client has secured an improper advantage over the other through fraud or deception."<sup>20</sup> This was not such a case. In addition, the Committee held that Canon 37 trumped both Canon 41 and Canon 29, titled "Upholding the Honor of the Profession."<sup>21</sup> Canon 29 stated in part: "The counsel upon the trial of a cause in which perjury has been committed owe it to the profession and to the public to bring the matter to the

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<sup>20</sup>American Bar Association Com. on Prof. Ethics, Formal Op. 287 (June 27, 1953), *available at* Westlaw aba-ethop database.

<sup>21</sup>*See Final Report of the Committee on Code of Professional Ethics*, 33 A.B.A. Rep. 567, 582 (1908).

knowledge of the prosecuting authorities.”<sup>22</sup> Although Canon 29 required the lawyer to disclose the prior perjury, this would “involve the direct violation of Canon 37,”<sup>23</sup> and as between the two, Canon 37 trumped Canon 29.

In the second situation, the Committee declared that if the lawyer’s knowledge of the client’s past criminal record was a result of a confidential communication, Canon 37 barred disclosure of the record. If the lawyer’s knowledge of the client’s past criminal record was not due to any private communication with the client, Canon 37 was inapplicable. If Canon 37 was inapt, the lawyer possessed a duty of candor to the tribunal if it appeared the court “relies on him as corroborating the correctness of the statement” that the client had no prior record. If the court specifically asked the lawyer whether the client had no record, the Committee concluded the lawyer should “advise the court not to rely on counsel’s personal knowledge as to the facts of the client’s record.”<sup>24</sup>

Committee member William B. Jones believed Canon 37 applied to each of the fact patterns, including the case in which the lawyer learned of the client’s past criminal record otherwise than through a confidential communication, and so concurred in part and dissented in part. Dissenting committee members Wilber M. Brucker and William H. White, on the other

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<sup>22</sup>American Bar Association, Canons of Ethics, Canon 29 (1908).

<sup>23</sup>American Bar Association Com. on Prof. Ethics, Formal Op. 287 (June 27, 1953).

<sup>24</sup>American Bar Association Com. on Prof. Ethics, Formal Op. 287 (June 27, 1953)(dissenting opinion).

hand, concluded that Canons 29 and 41 require a lawyer to speak up in the circumstances of the presented cases, and criticized the majority opinion's "obeisance to Canon 37."<sup>25</sup>

Between the 1953 Formal Opinion and the adoption of the Code of Professional Responsibility in 1969, the ABA did not re-address the issue of the lawyer's duty to maintain confidences. The ABA Special Committee on the Evaluation of Ethical Standards ("Wright Committee") began drafting what became the Code in the mid-1960s. The extent of the duty to maintain client confidences remained unclear even during the drafting process.

#### *B. The Code of Professional Responsibility and the Federal Rules of Evidence*

The Preliminary Draft of the Code of Professional Responsibility was distributed by the Wright Committee in October 1968 to a select group of 550, and a preliminary draft was sent on January 15, 1969 to approximately 20,000 persons.<sup>26</sup> After receiving "hundreds" of comments on the preliminary draft, the Wright Committee made several changes and a final draft was presented to the ABA on July 1, 1969.<sup>27</sup> At the ABA's Annual Meeting in August 1969, the Code was adopted, effective January 1, 1970.<sup>28</sup>

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<sup>25</sup>*Id.*

<sup>26</sup>*See Report of Special Committee on Evaluation of Ethical Standards*, 94 A.B.A. Rep. 728 (1969). *See also* Judith L. Maute, *Changing Conceptions of Lawyers Pro Bono Responsibilities: From Chance Noblesse Oblige to Stated Expectations*, 77 Tul. L. Rev. 91, 118 n.151 (2002).

<sup>27</sup>*See* 94 ABA Ann. Rep. 728 (1969).

<sup>28</sup>*See House of Delegates Proceedings*, 94 A.B.A. Rep. 389, 392 (1969)(adopting Code).

The Code consisted of nine broad Canons. Within each Canon were Ethical Considerations (EC or ECs), “aspirational in character,” followed by Disciplinary Rules (DR or DRs), mandatory in character. Canon 4 was titled “A Lawyer Should Preserve the Confidences and Secrets of a Client.” This Canon was followed by six Ethical Considerations and one Disciplinary Rule. The Ethical Considerations in Canon 4 of the Code largely reiterated the policies promoting client confidences found in Canon 37. The lone Disciplinary Rule, 4-101, defined “confidence” and “secret,”<sup>29</sup> stated the general rule of confidentiality, and ended with exceptions to the rule when the lawyer “may” reveal client confidences. Those exceptions were four in number. The exception most important to this discussion permitted the lawyer to reveal the “intention of his client to commit a crime and the information necessary to prevent a crime.”<sup>30</sup>

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<sup>29</sup>The Code noted that a “confidence” was a communication protected by the attorney-client privilege, meaning the communication between a lawyer and client was confidential and made for the purposes of rendering professional legal services to the client. A “secret” was information learned by the lawyer in the course of the representation of the client other than through a confidential communication. In Formal Opinion 287, the Committee implicitly distinguished between privileged communications (“confidences”) and information gathered by the lawyer other than through a confidential communication with a client (“secrets”). The Code protected both confidences and secrets, making no distinction between the two.

<sup>30</sup>*See Report of the Special Committee on Evaluation of Ethical Standards*, 94 A.B.A. Rep. 729, 760 (1969). The language of DR 4-101(C) stated:

Canon 7 expressed the duty of the lawyer to “Represent a Client Zealously Within the Bounds of the Law.” Disciplinary Rule 7-102(B) required that a “lawyer who receives information clearly establishing that: (1) his client has, in the course of representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal.”<sup>31</sup> DR 7-102(B)(1) thus rejected much of the conclusion of Formal Opinion 287. The lawyer of the divorce client who lied to the court was prohibited from disclosing the lie in the Formal Opinion, but was required by DR 7-102(B)(1) to do so. DR 7-102(B)(1) was not included in the January 1969 preliminary draft, but was added to the July 1969 final draft of the Code after the Wright Committee received comments on its preliminary draft.

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A lawyer may reveal:

- (1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.
- (2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.
- (3) The intention of his client to commit a crime, and the information necessary to prevent the crime.
- (4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

<sup>31</sup>*See Report of the Special Committee on Evaluation of Ethical Standards*, 94 A.B.A. Rep. 729, 779 (1969).

The language of DR 7-102(B)(1) did not fit comfortably with the language of DR 4-101(C)(3), which *permitted* a lawyer to reveal a client confidence if the client intended “to commit a crime and the information [was] necessary to prevent a crime.”<sup>32</sup> DR 4-101(C)(3) allowed disclosure of a confidence to prevent a future crime. DR 7-102(B)(1) *required* a lawyer to disclose a past (or current) fraud. These conflicting DRs were resolved in part by the ABA at its Midyear meeting in February 1974. It amended DR 7-102(B)(1) by adding an “excepting” clause at the end: “except when the information is protected as a privileged communication.”<sup>33</sup> As a result, if a lawyer learned of the fraud through a privileged communication (a “confidence” in the language of DR 4-101(A) of the Code), under the amended DR 7-102(B)(1), the lawyer was apparently not permitted to “reveal the fraud to the affected person or tribunal.”<sup>34</sup> The amendment did not appear to affect the exception to client confidentiality in Canon 4 *permitting* a lawyer to reveal a client confidence regarding future crimes, a category within which most frauds would fit.

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<sup>32</sup>The Reporter for the Wright Committee, Prof. John F. Sutton, Jr., noted that conflict in a 1976 oral history interview. *See* Interview of John Floyd Sutton, Jr., by Olavi Maru (Dec. 20, 1976), at 25, 28, *in* American Bar Foundation Program on Oral History (on file with author).

<sup>33</sup>*See Report of the Standing Committee on Ethics and Professional Responsibility*, 99 A.B.A. Rep. 262, 265 (1974). The House of Delegates approved this “housekeeping” amendment without debate. *See id.* at 166.

<sup>34</sup>American Bar Association Com. on Prof. Ethics, Formal Op. 341 (September 30, 1975), *available at* Westlaw aba-ethop database.



The “excepting” language to the DR 7-102(B)(1) of the Code was portrayed by the Standing Committee on Ethics and Professional Responsibility simply as a mere “housekeeping” amendment.<sup>35</sup> But it was not. It was adopted specifically in response to the National Student Marketing (NSM) scandal.<sup>36</sup> In 1969, NSM was about to merge with Interstate National Corporation. On October 31, 1969, the day of the merger, accountants Peat Marwick did not provide a signed “comfort letter.” Instead, the Peat Marwick partner in charge dictated via telephone an unsigned statement. NSM initially claimed a profit of about \$700,000 for the first nine months of its fiscal year. The unsigned statement suggested three material adjustments to profit, which turned that profit into a loss of about \$180,000. During the afternoon of the closing, attorneys for NSM and Peat Marwick representatives were in conversation concerning the status of the comfort letter and what it would state. A signed comfort letter was delivered to Interstate after the closing, and it included two additional statements. The first concerned an unaudited earnings report for nine months (an estimated loss of \$80,000) and an estimation that the fiscal year would be a break-even year in terms of earnings. The second paragraph stated the opinion of Peat Marwick that “the companies should consider submitting corrected interim unaudited

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<sup>35</sup>*See House of Delegates Proceedings*, 99 A.B.A. Rep. 166 (1974)(calling eight amendments to the Code “housekeeping” amendments). These amendments were adopted without debate. *See id.*

<sup>36</sup>The information in this paragraph is largely taken from *SEC v. National Student Marketing Corp.*, 457 F. Supp. 682 (D.D.C. 1978).

financial information to the shareholders prior to proceeding with the closing.”<sup>37</sup> Neither party publicly disclosed the statements in the comfort letter. After sales of NSM stock by former Interstate shareholders and officers, NSM’s stock price collapsed. Private lawsuits were filed, and the SEC investigated and filed its own suit. The SEC claimed that the law firms representing both NSM and Interstate had a duty to disclose the fraud, and when the SEC filed suit in 1972, the original DR 7-102(B)(1), which required disclosure of any fraud “to the affected person,” was the rule. By the time the district court issued its opinion in the matter, NSM’s counsel, White & Case, had settled with the SEC without an admission of any liability. Interstate’s counsel, Lord, Bissell & Brook, remained a defendant. The court held that the lawyers “were required to speak out at the closing concerning the obvious materiality of the information,” and “[t]heir silence was not only a breach of this duty to speak, but in addition lent the appearance of legitimacy to the closing.”<sup>38</sup>

In 1975, the ABA’s Standing Committee on Ethics and Professional Responsibility, in Formal Opinion 341, interpreted the 1974 “housekeeping” amendment to bar disclosure of a fraud by a client not only when the fraud was discovered by the lawyer through a confidential communication protected by the attorney-client privilege, but also when the information was, in

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<sup>37</sup>SEC v. National Student Marketing Corp., 457 F. Supp. 682, 696 (D.D.C. 1978).

<sup>38</sup>*Id.* at 713. White & Case settled for \$1.95 million and Lord, Bissell & Brook settled for \$1.3 million. See James M. McCauley, *Corporate Responsibility and the Regulation of Corporate Lawyers*, 3 Rich. J. Global L. & Bus. 15, 24 (2003).

the language of the Code, learned and protected as a “secret.”<sup>39</sup> A secret was defined in the Code as “other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.”<sup>40</sup> The “excepting” amendment to DR 7-102(B)(1) was limited by its text to a “privileged communication.” The amendment was thus applicable only to confidences. By interpreting the language of the amendment to include both confidences and secrets, Formal Opinion 341 thus could interpret the phrase “privileged communication” in the 1974 amendment to refer “to those confidences and secrets that are required to be preserved by DR 4-101.”

The consequences of this opinion did not appear to be understood by the ABA Standing Committee. For example, if a lawyer learned that a client was engaged in a current or future fraud through a confidential communication, at least two reasons existed why the communications was not a “privileged communication.” First, the attorney-client privilege protected only those confidential communications that were made for the purpose of rendering professional legal services. In some circumstances, such a confidential communication might not be protected because not made for the purpose of rendering professional legal services. Additionally, the crime-fraud exception to the attorney-client privilege likely meant no privilege existed. On the other hand, a client confessing a past fraud to his attorney was a communication likely protected by the attorney-client privilege. When the Standing Committee interpreted the “excepting” language to bar a lawyer from disclosing a “secret,” the consequence was that, even

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<sup>39</sup>American Bar Association Com. on Prof. Ethics, Formal Op. 341 (September 30, 1975).

<sup>40</sup>Code of Professional Responsibility, DR 4-101(A) (1969).

when the attorney-client privilege was inapplicable, the lawyer was not permitted to disclose the client's current or future fraud if the client requested the lawyer hold that knowledge inviolate because disclosure would be embarrassing or detrimental to the client. It seems almost too plain to note that the public disclosure of any current or future fraud committed by a client would be either embarrassing or detrimental to the client.<sup>41</sup>

Formal Opinion 341 initially concluded that the 1974 amendment "reinstate[d] the essence of Opinion 287 which had prevailed from 1953 until 1969."<sup>42</sup> The reinstatement of Opinion 287 meant that the "tradition" (no modifier was given) was that confidences shall be kept "in all but the most serious cases." The Standing Committee did not offer any case authority instantiating that tradition; it merely concluded that, in reconciling "the conflicting duties to reveal fraud and to preserve confidences," "it is clear that there has long been an accommodation in favor of preserving confidences either through practice or interpretation."<sup>43</sup> To justify its broad interpretation of "privileged communication," the Standing Committee concluded that limiting the phrase to communications between lawyer and client privileged under the rules of evidence was "undesirable because the lawyer's ethical duty would depend upon the rules of evidence in a

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<sup>41</sup>As Geoffrey Hazard, the reporter for the ABA Commission on Evaluation of Professional Standards, which drafted the Model Rules of Professional Conduct, noted, Formal Opinion 341 also had the perverse effect of denying the lawyer the option of disclosing the fraud as a matter of self-defense. See Geoffrey C. Hazard, Jr., *Rectification of Client Fraud: Death and Revival of a Professional Norm*, 33 Emory L. J. 271, 294 n.38 (1984).

<sup>42</sup>American Bar Association Com. on Prof. Ethics, Formal Op. 341 (September 30, 1975).

<sup>43</sup>American Bar Association Com. on Prof. Ethics, Formal Op. 341 (September 30, 1975).

particular jurisdiction.”<sup>44</sup> This would lead to the unreasonable possibility that the lawyer would be put “at peril of discipline” if he had to make difficult judgments concerning the state of the attorney-client privilege, or, in multiple jurisdictional cases, to determine which state’s evidentiary privilege law applied.

The Standing Committee’s reasoning in Formal Opinion 341 is astonishingly poor even beyond its inability to understand the meaning of “privileged communication.” First, the Committee relies on a “tradition” that appears limited to a citation to Formal Opinion 287, issued in 1953. That opinion was not only not law, it was adopted over a strong dissent, a fact the 1975 Committee ignores. Relatedly, a “tradition” might be found in the language of Canon 41, adopted by the ABA in 1928, which strongly suggested a lawyer’s duty to disclose a “fraud or deception” when discovered by a lawyer. Second, Formal Opinion 341 notes that DR 7-102(B)(1) was not included in the January 1969 Preliminary Draft of the Wright Committee, and only added by the Wright Committee to the final draft after “[s]ome lawyers objected.” Opinion 341 interprets this change to the final version of the Code as evidence that exceptions to the duty of confidentiality were “so weak that the earlier drafts of the Code of Professional Responsibility omitted altogether the concept embodied in Canon 41” (the precursor to DR 7-102(B)).<sup>45</sup> As a matter of intention, wouldn’t an objection “by some lawyers” to the absence of an exception to the rule of client confidentiality in the Preliminary Draft, and a decision by the Wright Committee to respond to that objection by adding a provision (DR 7-102(B)) that acknowledged

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<sup>44</sup>American Bar Association Com. on Prof. Ethics, Formal Op. 341 (September 30, 1975).

<sup>45</sup>American Bar Association Com. on Prof. Ethics, Formal Op. 341 (September 30, 1975).

an exception to the duty to keep client confidences, instead suggest a tradition allowing or even requiring lawyers to disclose a client's fraud? The Committee offers no evidence that "some lawyers" bullied or tricked the Wright Committee into adding an exception to client confidences contrary to tradition, or that "some lawyers" proposing this addition represented an outlying minority of the legal profession. And, no matter why the Wright Committee added DR 7-102(B), it did so at the behest of lawyers who believed the duty of confidentiality did not include the situation in which the lawyer received information that the client was engaged in fraud, a fact the Committee too hastily dismisses. Third, Opinion 341's focus is nearly entirely the fear of discipline in case the lawyer errs. It speaks little of the justifications of the duty of confidentiality for clients, and not at all about the social costs of a nearly impenetrable duty of confidentiality. That lawyers might have to interpret the law in order to decide what conduct they might or must engage in is required all the time of clients (that's one value of counseling). When the law that must be interpreted is the law of attorney-client privilege, the objection seems even less valid, for lawyers with clients must constantly be aware of the extent of the privilege. In 1974, the extent of the privilege between attorney and corporate client was unsettled, both as it pertained to matters that implicated both federal and state law, and as it concerned communications that involved more than one state (such as telephone calls between lawyer and corporate representative located in two separate states, or in which two or more states claimed an interest in the matter).<sup>46</sup> Thus, a lawyer in 1975 already had to make difficult judgments concerning the

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<sup>46</sup>The Supreme Court interpreted the corporate client-lawyer privilege in *Upjohn v. United States*, 449 U.S. 383 (1981), rejecting the "control group" test. Even after doing so, not all states followed the Court's interpretation, which meant a communication protected under

attorney-client privilege, and mistakes concerning the privilege might harm the client. If a lawyer interpreted unsettled law incorrectly, the harm of such an incorrect interpretation fell on the client. Why should a lawyer be shielded from any possible harm if he incorrectly applied unsettled law when no such shield existed for clients? The reasoning in Formal Opinion 341 is evidence of the lack of belief in the very system of law in which lawyers practice.

Despite the amendment to DR 7-102(B)(1) of the Code of Professional Responsibility and the broad reading of that amendment in 1975 in Formal Opinion 341, the Standing Committee on Ethics and Professional Responsibility in 1991 noted that “[t]he majority of states did not amend their codes of professional responsibility to include the 1974 amendment.”<sup>47</sup> Two articles published in 1984 counted 14 or 17 states (of over 45 adopting the Code) accepting the amendment to DR 7-102(B)(1) as of 1983.<sup>48</sup>

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federal law might not be protected under state law, or if more than one state’s privilege law applied to the communication, might be privileged in some but not all states. Federalism creates many problems in legal interpretation, which budding lawyers learn early in law school.

<sup>47</sup>*See Report No. 2 of the Standing Committee on Ethics and Professional Responsibility*, 116(2) A.B.A. Rep. 108, 111 (1991).

<sup>48</sup>*See* Geoffrey C. Hazard, Jr., *Rectification of Client Fraud: Death and Revival of a Professional Norm*, 33 Emory L.J. 271, 294 n.38 (1984)(counting 14 states); R.W. Nahstoll, *The Lawyer’s Allegiance: Priorities Regarding Confidentiality*, 41 Wash. & Lee L. Rev. 421, 433 (1984)(counting 17 states).

As the ABA readied itself to adopt the Code of Professional Responsibility, the Advisory Committee on the Rules of Evidence, appointed by Chief Justice Earl Warren in 1965, issued its first draft of the proposed Federal Rules of Evidence for public comment in March 1969.<sup>49</sup> Proposed Rule 5-03 concerned the attorney-client privilege. Section (d) of this Rule stated five exceptions to the privilege.<sup>50</sup> In both the revised draft issued for public comment in March

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<sup>49</sup>See *Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates*, 46 F.R.D. 161 (1969). The cover letter by chairman Albert E. Jenner, Jr., to the Standing Committee was dated January 31, 1969.

<sup>50</sup>The five exceptions were:

- (1) Furtherance of crime or fraud. If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud; or
- (2) Claimants through same deceased client. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by *inter vivos* transaction; or
- (3) Breach of duty by lawyer or client. As to a communication relevant to an issue of breach of duty by the lawyer to his client or by the client to his lawyer; or
- (4) Document attested by lawyer. As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or
- (5) Joint Clients. As to a communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a



1971<sup>51</sup> and in the final draft published in 1972,<sup>52</sup> the Advisory Committee proposed the same five exceptions to the privilege without change.

As noted by the Advisory Committee's Notes, the exceptions "in general incorporate[] well established exceptions" to the attorney-client privilege.<sup>53</sup> For purposes of this essay, the first exception to the privilege is the most important. Proposed Rule 5-03(d)(1) excepted from the attorney-client privilege communications in which the client used or attempted to use the lawyer's services "to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud."<sup>54</sup>

Congress formally rejected the 13 proposed rules on privileges. It replaced those rules with Rule 501, which required courts to interpret privileges as "governed by the principles of the

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lawyer retained or consulted in common, when offered in an action between any of the clients.

*See id.* at 251.

<sup>51</sup>*See Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates*, 51 F.R.D. 315, 362 (1971).

<sup>52</sup>*See Rules of Evidence for United States Courts and Magistrates*, 56 F.R.D. 183, 236-37 (1972).

<sup>53</sup>*See Rules of Evidence for United States Courts and Magistrates*, 56 F.R.D. 183, 239 (1972).

<sup>54</sup>Prop. Fed. R. Evid. 503(d)(1), 56 F.R.D. 183, 236 (1972).

common law,”<sup>55</sup> As interpreted by federal courts since the adoption of the Federal Rules of Evidence, the “furtherance of crime or fraud” exception to the attorney-client privilege remains a “well established exception” to the privilege.<sup>56</sup>

In addition to the SEC’s lawsuit in the National Student Marketing matter, two events arising in the mid-1970s created additional stresses on the extent to which the lawyers protected client confidences. The first alarmed the public, even though lawyers for the most part found the conduct of the lawyers exceptional though not unethical. The second alarmed lawyers, for it suggested professionals might have duties to third parties even when clients spoke confidentially.

In 1974, upstate New York lawyers Francis Belge and Frank Armani defended Robert Garrow against a charge of murder.<sup>57</sup> Garrow was charged with the brutal killing of Philip Dombrewski, and was believed responsible for the unsolved murder of Daniel Porter, and the disappearance (and presumed murder) of Susan Petz and Alicia Hauck. After Garrow’s arrest, his lawyers decided that Garrow’s best defense was to claim insanity. Belge and Armani began

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<sup>55</sup>Fed. R. Evid. 501.

<sup>56</sup>*See* United States v. Zolin, 491 U.S. 554, 556 (1989)(noting issue concerns “the generally recognized exception to that privilege for communications in furtherance of future illegal conduct-the so-called ‘crime-fraud’ exception”).

<sup>57</sup>The information in this paragraph is taken from Richard Zitrin and Carol M. Langford, THE MORAL COMPASS OF THE AMERICAN LAWYER 7-26 (1999). *See also* New York v. Belge, 83 Misc.2d 186, 372 N.Y.S.2d 798 (Onondaga Cty. Ct. 1975).

asking Garrow about Porter, Petz and Hauck, and Garrow eventually confessed. Garrow then gave Belge and Armani directions to the bodies of Petz and Hauck. The lawyers found the bodies where Garrow told them they were located, and upon doing so took photos. They did not inform the police or anyone else of this knowledge, including the fathers of both women. Before the trial began in May 1974, the bodies of Petz and Hauck were found. At the trial, Garrow testified, and stated that he had killed Porter, Petz and Hauck in addition to Dombrowski. After Garrow testified, the lawyers held a press conference at which they stated they had known of Garrow's involvement in the murders of Daniel Porter, Susan Petz and Alicia Hauck since late August 1973. Garrow was convicted.

In early 1975 Belge was indicted for violating New York Public Health law for failing to report to authorities the location of the bodies and for denying the murder victims a burial.<sup>58</sup> The trial court dismissed the indictment on the ground that the attorney-client privilege outweighed the Public Health law, relying in part of the slippery slope argument of the National Association of Criminal Defense Counsel: “‘If this indictment stands, ‘The attorney-client privilege will be effectively destroyed. No defendant will be able to freely discuss the facts of his case with his attorney. No attorney will be able to listen to those facts without being faced with the Hobson’s choice of violating the law or violating his professional code of Ethics.’”<sup>59</sup> On appeal, the trial court’s conclusion was upheld.<sup>60</sup> Although the Appellate Division affirmed the dismissal of the

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<sup>58</sup>New York v. Belge, 83 Misc.2d 186, 372 N.Y.S.2d 798 (Onondaga Cty. Ct. 1975).

<sup>59</sup>*Id.* at 187-88, 372 N.Y.S.2d at 800.

<sup>60</sup>People v. Belge, 50 A.D.2d 1088, 376 N.Y.S.2d 771 (App. Div. 1975), *aff’d* 359

indictment, it rejected an absolute claim of attorney-client privilege. The court noted, “We believe that an attorney must protect his client’s interests, but also must observe basic human standards of decency, having due regard to the need that the legal system accord justice to the interests of society and its individual members.”<sup>61</sup> It reiterated the narrowness of its holding, declaring that it was deciding only the legal issue of the sufficiency of the indictment, and not deciding “the ethical questions underlying this case.”<sup>62</sup>

On July 1, 1976, the Supreme Court of California issued its opinion in *Tarasoff v. Regents of the University of California*.<sup>63</sup> The court held that a therapist could be held liable in tort for failure to warn when a patient made confidential statements to the therapist that he had thoughts about killing Tatiana Tarasoff, and later made good on his promise (or thoughts). The court noted that the California evidence code excepted from the patient-psychotherapist privilege confidential communications “if the psychotherapist has reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous to himself or to the person or property of another and that disclosure of the communication is necessary to prevent the

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N.E.2d 377 (N.Y. 1976).

<sup>61</sup>*Id.* at 772.

<sup>62</sup>*Id.* at 772.

<sup>63</sup>17 Cal.3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976). The Supreme Court of California initially issued its opinion on December 23, 1974. *See Tarasoff v. Regents of the University of California*, 13 Cal.3d 177, 529 P.2d 553, 118 Cal. Rptr. 129 (1974).

threatened danger.”<sup>64</sup> It additionally noted that disclosure did not violate medical ethics: “‘A physician may not reveal the confidence entrusted to him in the course of medical attendance . . . unless he is required to do so by law or unless it becomes necessary in order to protect the welfare of the individual or of the community.’”<sup>65</sup> Three years later, the Washington Court of Appeals issued its opinion in *Hawkins v. King County, Department of Rehabilitative Services*.<sup>66</sup> Michael Hawkins was represented by Richard Sanders, his attorney, at a bail hearing. The attorney for Hawkins’s mother and a psychiatrist both told Sanders before the hearing that Sanders was mentally ill. Hawkins asked Sanders to obtain his release from incarceration, and Sanders complied with the request. Eight days later, Hawkins assaulted his mother and then attempted suicide, which resulted in the amputation of both of Hawkins’s legs. Both Hawkins’s guardian and his mother case sued Sanders and others, invoking *Tarasoff*. Although the court of appeals affirmed the dismissal of the tort claim against Sanders, it did so on the grounds that the facts of *Hawkins* were distinguishable from *Tarasoff*.<sup>67</sup> As an legal matter, however, the court

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<sup>64</sup>*Id.* at 441, 551 P.2d at 347 (quoting Evidence Code § 1024).

<sup>65</sup>*Id.* at 441-42, 551 P.2d at 347 (emphasis added)(quoting § 9 of the Principles of Medical Ethics of the American Medical Association (1957)).

<sup>66</sup>24 Wash. App. 338, 602 P.2d 361 (1979).

<sup>67</sup>*See id.* at 345, 602 P.2d at 365-66:

In the instant case Michael Hawkins’ potential victims, his mother and sister, knew he might be dangerous and that he had been released from confinement, contrary to Tatiana Tarasoff’s ignorance of any risk of harm. Thus, no duty befell Sanders to warn Frances Hawkins of a risk of which she was already fully

appeared to accept the existence of some duty by lawyers to warn in cases similar to *Tarasoff*: “We are persuaded by the position advanced by amicus ‘that the obligation to warn, when confidentiality would be compromised to the client’s detriment, must be permissive at most, unless it appears beyond a reasonable doubt that the client has formed a firm intention to inflict serious personal injuries on an unknowing third person.’”<sup>68</sup>

Within three years of its adoption by the ABA, 43 states and District of Columbia had adopted all or part of the Code of Professional Responsibility.<sup>69</sup> Yet, by 1977, ABA President William Spann appointed the Commission on Evaluation of Professional Standards in 1977 to evaluate “all facets of legal ethics.”<sup>70</sup> At its annual meeting in August 1977, the ABA created a

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cognizant. Further, it must not be overlooked that Sanders received no information that Hawkins planned to assault anyone, only that he was mentally ill and likely to be dangerous to himself and others. That Sanders receive no information directly from Michael Hawkins is the final distinction between the two cases.

<sup>68</sup>*Id.* at 344, 602 P.2d at 365. *See also* State v. Hansen, 122 Wash.2d 712, 721, 862 P.2d 117, 122 (1993)(holding “attorneys, as officers of the court, have a duty to warn of true threats to harm members of the judiciary communicated to them by clients or by third parties”).

<sup>69</sup>*See Report of Special Committee to Secure Adoption of the Code of Professional Responsibility*, 97 A.B.A. REP. 740, 741 (1972).

<sup>70</sup>William B. Spann, Jr., *The Legal Profession Needs a New Code of Ethics*, Bar Leader, Nov.-Dec. 1977, at 2, 3, *quoted in* Ted Schneyer, *Professionalism as Politics: The Making of*

Special Committee on the Code of Professional Responsibility charged with assessing the Code in time for a tenth anniversary meeting in 1979.<sup>71</sup> A year later, with the addition of three members, including two nonlawyer members, the Special Committee was reconstituted as the Commission on Evaluation of Professional Standards (Kutak Commission) to restructure the rules of professional responsibility.<sup>72</sup> One reason for the creation of the Kutak Commission, according to Spann, was to deal with the SEC's interpretation of the lawyer's duty to disclose confidences demonstrated in the *National Student Marketing* matter.<sup>73</sup>

### *C. Drafting the Model Rules*

The Kutak Commission released the Discussion Draft of its proposed Model Rules of Professional Conduct dated January 30, 1980. The Discussion Draft included a provision on confidentiality (1.7(a)) written as stating both the traditional attorney-client privilege and the duty of confidentiality:

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*Modern Legal Ethics Code*, 14 Law & Soc. Inq. 677, 677 (1989).

<sup>71</sup>See *Annual Meeting Board of Governors*, 102 A.B.A. Rep. 581 (1977)(creating Special Committee).

<sup>72</sup>See *Annual Meeting Board of Governors*, 103 A.B.A. Rep. 646 (1978)(reconstituting Special Committee as a Commission). The Commission was chaired by Omaha lawyer Robert Kutak and was known as the Kutak Commission.

<sup>73</sup>See Ted Schneyer, *Professionalism as Politics: The Making of Modern Legal Ethics Code*, 14 Law & Soc. Inq. 677, 689-90 (1989).

In giving testimony or providing evidence concerning a client's affairs, a lawyer shall not disclose information concerning a client except as authorized by the applicable law of evidentiary privilege. In other circumstances, a lawyer shall not disclose information about a client which relates to the client-lawyer relationship, which would embarrass the client, which is likely to be detrimental to the client, or which the client has requested not be disclosed, except as stated in paragraphs (b) and ( c).<sup>74</sup>

The remainder of 1.7 of the Discussion Draft contained two sets of exceptions from the stated rule. Subsection (b) of Rule 1.7 began "A lawyer shall disclose information," indicating when a lawyer was required to disclose a client confidence. Subsection (b) contained two cases: "to the extent it appears necessary to prevent the client from committing an act that would result in death or serious bodily harm to another person, and to the extent required by law or the rules of professional conduct."<sup>75</sup>

Subsection 1.7(c) began "A lawyer may disclose information about a client only." It then listed four instances:

1) for the purpose of serving the client's interest, unless it is information the client

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<sup>74</sup>Model Rules of Professional Conduct 1.7, Discussion Draft (Jan. 30, 1980), at 21-22.

<sup>75</sup>*Id.* at 22.



has specifically requested not be disclosed;

2) to the extent it appears necessary to prevent or rectify the consequences of a deliberately wrongful act by the client, except when the lawyer have been employed after the commission of such an act to represent the client concerning the act or its consequences;

3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client, or to establish a defense to a civil or criminal claim or charge against the lawyer based upon conduct in which the client was involved; or

4) as otherwise permitted by law or the rules of professional conduct.<sup>76</sup>

The negative reaction to proposed rule 1.7 came from both the left and right, and because a “working draft” of what became the Discussion Draft had been published almost six months earlier by the Daily Report for Executives on August 13, 1979,<sup>77</sup> those opposed to the exceptions to client confidentiality had plenty of time to sharpen their critiques. The opinion page of *The*

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<sup>76</sup>*Id.*

<sup>77</sup>See Mark H. Aultman, *Legal Fiction Becomes Legal Fantasy*, 7 J. Legal Prof. 31, 39 (1982)(noting “working draft” was “to be reviewed by a select few” but was published by “a newspaper or two, and appeared in the Daily Report for Executives, issued by the Bureau of National Affairs”). The August 2, 1979 working draft was also published in *Legal Times* and the reported in the *National Law Journal*. See Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 Law & Soc. Inq. 677, 701 n.147 (1989).

*Wall Street Journal* titled an editorial lambasting a related proposal *A License to Squeal?*.<sup>78</sup> Monroe Freedman, a well-known proponent of a vision of lawyering that promotes (almost exclusively) client autonomy, including a very strong duty of client confidentiality, was also shown a copy of the working draft.<sup>79</sup> Freedman leaked the working draft at the ABA's 1979 annual meeting.<sup>80</sup> He then began working on an alternative code as the Reporter for the Commission on Professional Responsibility of The Roscoe Pound-American Trial Lawyers Foundation. The Public Discussion Draft of the ATLF's American Lawyer's Code of Conduct, dated June 1980, included two alternatives (named Alternative A and Alternative B) regarding the rule of client confidentiality and its exceptions.<sup>81</sup> Neither permitted a lawyer to disclose a client confidence "to prevent or rectify the consequences of a deliberately wrongful act by the client." Alternative B did not permit a lawyer to disclose a client confidence even "when the lawyer reasonably believes that divulgence is necessary to prevent imminent danger to human

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<sup>78</sup>See W. William Hodes, *The Code of Professional Responsibility, The Kutak Rules, and the Trial Lawyer's Code: Surprisingly, Three Peas in a Pod*, 35 U. Miami L. Rev. 739, 746 (1981), citing Wall St. J., Feb. 11, 1980, at 20.

<sup>79</sup>See Mark H. Aultman, *Legal Fiction Becomes Legal Fantasy*, 7 J. Legal Prof. 31, 39 (1982).

<sup>80</sup>See Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 Law & Soc. Inq. 677, 702 (1989).

<sup>81</sup>See Commission on Professional Responsibility of The Roscoe Pound-American Trial Lawyer's Foundation, *The American Lawyer's Code of Conduct Public Discussion Draft-June 1980*, TRIAL, Aug. 1980, at 44, 50.

life.”<sup>82</sup>

The Kutak Commission spent most of 1980 listening to a wide variety of comments on its draft. When it returned with a Proposed Final Draft, released on May 30, 1981, much had changed regarding client confidentiality.<sup>83</sup> The Proposed Final Draft nearly completely re-wrote

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<sup>82</sup>See Commission on Professional Responsibility of The Roscoe Pound-American Trial Lawyer's Foundation, *The American Lawyer's Code of Conduct Public Discussion Draft-June 1980*, TRIAL, Aug. 1980, at 44, 50 (quoting exception in Alternative A eliminated from Alternative B).

<sup>83</sup>In the interim, the Supreme Court of the United States issued its opinion in *Upjohn v. United States*, 449 U.S. 383 (1981)(released on January 13, 1981), which upheld a broad claim of attorney-client privilege and attorney work product doctrine. In *Upjohn*, the company began an investigation to determine if some of its employees had violated the Foreign Corrupt Practices Act. Part of the investigation involved having both outside counsel and in-house counsel obtain information from employees, both those within the control group (high echelon executives) and employees from beyond the control group, concerning the actions taken by employees. A questionnaire was created by counsel, and employees were told to fill it out and give their answer to in-house counsel. The IRS demanded copies of the completed questionnaires, counsel's notes and memoranda related to those questionnaires and the names of the employees with knowledge of the events at issue. The company declined. The Court held that the attorney-corporate client privilege applied to communications between in-house counsel and non-control group employees and found the memoranda created by counsel was protected by the work product doctrine.

the provision on confidentiality (and moved it to its final location as Rule 1.6). First, section (a) offered a terse command: “A lawyer shall not reveal information relating to representation of a client except as stated in paragraph (b), unless the client consents after disclosure.”<sup>84</sup> By using “shall,” the Kutak Commission signaled a lawyer was subject to discipline if the lawyer revealed information otherwise than permitted in section (b). Second, the Kutak Commission eliminated any occasion requiring (“shall”) a lawyer to disclose client confidences. Section (b) began, “A lawyer may reveal.” Third, the Proposed Final Draft eliminated all of the language used in the Discussion Draft concerning the attorney-client privilege in an attempt to craft a clear distinction between the law of privilege and the law of client confidences. Fourth, a lawyer was permitted to disclose a client confidence to prevent the “substantial injury to the financial interest or property of another.” The Discussion Draft version permitted a lawyer to “prevent ... the consequences of a deliberately wrongful act by the client.” Paragraph (b) listed five possible exceptions to the rule keeping confidences:

- 1) to serve the client’s interests, unless it is information the client has specifically requested not be disclosed;
- 2) to prevent the client from committing a criminal or fraudulent act that the

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Although it declined to hold opinion work product absolute, it stated “we think a far stronger showing of necessity and unavailability by other means than was made by the Government or applied by the magistrate in this case would be necessary to compel disclosure.” *Id.* at 401-02.

<sup>84</sup>American Bar Association Commission on Evaluation of Professional Standards, MODEL RULES OF PROFESSIONAL CONDUCT PROPOSED FINAL DRAFT 37 (May 30, 1981).

lawyer believes is likely to result in death or substantial bodily harm, or substantial injury to the financial interest or property of another;

3) to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used;

4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, or to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved; or

5) to comply with the rules of professional conduct or other law.<sup>85</sup>

The final draft was published on June 30, 1982.<sup>86</sup> The Kutak Commission tinkered with Proposed Rule 1.6 in the 1982 final draft. It eliminated the first exception by rephrasing it and placing it within the rule. The second exception (now proposed as the first exception) added "reasonably" to the state of the lawyer's belief that death, substantial bodily harm or substantial injury to another's financial interests "is likely to result." The third exception deleted "commission" of the fraudulent act and replaced it with "furtherance."<sup>87</sup>

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<sup>85</sup>American Bar Association Commission on Evaluation of Professional Standards, MODEL RULES OF PROFESSIONAL CONDUCT PROPOSED FINAL DRAFT 37-38 (May 30, 1981).

<sup>86</sup>*See Report of the Commission on Evaluation of Professional Standards*, 107 A.B.A. Rep. 828, 833 (1982)(reprinting as Exhibit A the Proposed Final Draft as amended through June 30, 1982).

<sup>87</sup>*See Report of the Commission on Evaluation of Professional Standards*, 107 A.B.A. Rep. 828, 846 (1982). In addition, what was the third exception in paragraph (b) of the 1982 final

The ABA sent to the Model Rules to the House of Delegates for discussion at its 1982 Annual Meeting. The House decided its initial discussion would be limited to the black letter rules, and within those rules, to the “more important and controversial Rules.”<sup>88</sup> Debate in the House of Delegates began with Rule 1.5 concerning fees. By the time the House had completed its evaluation of Rule 1.5, only a brief time was available to discuss Rule 1.6. When the allotted time for discussion expired, the House deferred its debate until the midyear meeting in February 1983. As noted by Kutak Commission Reporter Geoffrey Hazard, “[t]his delay gave the opposition time to organize, which it did very effectively.”<sup>89</sup>

The House of Delegates re-commenced its discussion on proposed Model Rule 1.6 less than a month after a lengthy story in the New York Times Sunday Magazine titled *Ethics and the Law: A Case History*, about the O.P.M. Leasing Company scandal.<sup>90</sup> By the time O.P.M. collapsed in early 1981, it had obtained approximately \$200 million in loans based on fraudulent draft now permitted the lawyer to disclose a confidence in response to a disciplinary complaint. That meant that the fourth and final exception merely stated “to comply with other law.” *See id.*

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<sup>88</sup>*See* Geoffrey C. Hazard, Jr., *Rectification of Client Fraud: Death and Revival of a Professional Norm*, 33 Emory L. J. 271, 301 (1984).

<sup>89</sup>*See id.* at 302.

<sup>90</sup>*See* Stuart Taylor Jr., *Ethics and the Law: A Case History*, New York Times, Jan. 9, 1983, § 6, at 31. The material in this paragraph is taken from this article. O.P.M. stood for “Other People’s Money,” an apt name.

leases. This was then the largest fraud in American history. The law firm of Singer Hutner handled almost all aspects of O.P.M.'s legal affairs, as well as the personal legal affairs of its owners, Mordecai Weissman and Myron Goodman. O.P.M. accounted for about sixty percent of Singer Hutner's total income, and Singer Hutner lawyer Andrew Reinhard served as the third director of O.P.M. On June 12, 1980, Goodman disclosed to Joseph L. Hutner, the senior partner of Singer Hutner, the possibility that he had committed past wrongs on "behalf" of O.P.M. This disclosure came during a meeting at Singer Hutner's offices on the same day the firm received a letter from O.P.M.'s chief in-house accountant revealing the lease fraud. Goodman somehow managed to take possession of the letter. Goodman later told New York Times reporter Stuart Taylor that this was a cover story he and Reinhard agreed to. Goodman alleged Reinhard had been reading the letter when Goodman took it. Once he had the letter, Goodman refused either to give it to the law firm or to disclose fully the "past wrongs" (fraud) unless Singer Hutner could promise complete confidentiality. Hutner refused to do so. After a meeting with O.P.M.'s in-house accountant and the lawyer for the whistle-blowing accountant, it was fairly clear to the lawyers that O.P.M.'s survival would require additional fraudulent acts. Singer Hutner hired its own counsel, which advised that the firm could continue to represent O.P.M. if Goodman assured them the fraud had ceased. In September 1980, Singer Hutner voted to withdraw from representation of O.P.M. Once again following the advice of outside counsel, the firm's disengagement was not immediate but gradual. This allowed both O.P.M.'s fraud to be kept secret and allowed Singer Hutner to collect \$250,000 in fees owed it by O.P.M. and to receive a retainer of \$250,000 for any future work required by O.P.M. When Goodman asked the law firm of Kaye Scholer to take over O.P.M.'s legal work, a Kaye Scholer partner, Peter Fishbein, called

Hutner to ask “if there was anything he should be aware of.” Hutner replied that the firm and O.P.M. had mutually agreed to terminate their relationship, and that “the circumstances of termination would not be discussed.” Kaye Scholer then represented O.P.M., allowing O.P.M. to obtain more than \$15 million in additional loans based on fraudulent leases before the fraud was finally uncovered.

When the discussion turned to Model Rule 1.6 in February 1983, Reporter Geoffrey Hazard noted the duty of confidentiality was written more broadly in the Model Rule than in the Code. He also referred specifically to “the implication of the recent case involving fraud by O.P.M. Leasing Company for the exception relating to the prevention or rectification of financial or property injury.”<sup>91</sup> An amendment to the exceptions to the duty in Model Rule 1.6(b) was immediately offered, and a vigorous debate ensued. The House of Delegates adopted the proposed amendment (207-129), leaving Model Rule 1.6(b) to read:

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or

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<sup>91</sup>See *House of Delegates Proceedings Midyear Meeting*, 108 A.B.A. Rep. 295-96 (1983).



civil claim against the lawyer based upon conduct in which the client was involved, or to respond to the client's allegations in any legal proceeding concerning the lawyer's professional conduct for the client.<sup>92</sup>

As amended, Model Rule 1.6 prohibited a lawyer from disclosing a confidence in order to “prevent the client from committing a criminal or fraudulent act that the lawyer believes is likely to result in ... substantial injury to the financial interest or property of another.” It also prohibited a lawyer from disclosing a confidence in order “to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used.”

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<sup>92</sup>*See House of Delegates Proceedings Midyear Meeting*, 108 A.B.A. Rep. 298 (1983). A proposed amendment that “a lawyer shall disclose such information to the extent the lawyer believes necessary to prevent death or substantial bodily harm to any person” was rejected apparently in part because it was believed to have been implicitly rejected by the earlier amendment. *Id.* at 299. This was erroneous because amended Model Rule 1.6(b)(1) only concerned the actions of the client. The proposed amendment allowed disclosure when the lawyer obtained information that another person planned to harm someone (e.g., the client tells the lawyer, “My brother is going to make sure that witness never testifies against me,” or brother of client tells lawyer, “I’m going to kill the witness.”) Another proposed amendment, adding the words “upon appropriate notice to the client” to what became Model Rule 1.6(b)(2) was also defeated. *See id.* The ABA finally adopted a version of the “harm to another” amendment to Model Rule 1.6 in 2001. *See House of Delegates Proceedings*, 126:2 A.B.A. Rep. 13 (2001).

The amendment of Model Rule 1.6 by the House of Delegates confused even high ranking ABA officers. President-elect designate John Shepherd gave a press conference the day after the ABA decided to amend proposed Model Rule 1.6. As noted by Stuart Taylor, Shepherd “contradicted himself repeatedly about whether ... lawyers could inform on clients who were committing fraud,”<sup>93</sup> for Shepherd incorrectly understood the rule to permit though not require lawyers to disclose a client fraud. On the other hand, as noted by Geoffrey Hazard, some lawyers erroneously viewed the ABA’s decision as vindicating the actions of Singer Hutner lawyers in the O.P.M. matter.<sup>94</sup>

The victory achieved by opponents to the Kutak Commission’s proposal was less than clear. The day after the vote to amend Proposed Model Rule 1.6, the House addressed Proposed Model Rule 3.3, which prohibited a lawyer from offering “evidence that the lawyer knows to be

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<sup>93</sup>Stuart Taylor Jr., *Lawyers Vote for Disclosure If Needed to Correct Perjury*, N.Y. Times, Feb. 9, 1983, at A24.

<sup>94</sup>See Geoffrey C. Hazard, Jr., *Rectification of Client Fraud: Death and Revival of a Professional Norm*, 33 Emory L. J. 271, 306 (1984)(reporting on “good authority” that a Singer Hutner lawyer received calls from several lawyers after ABA amended Proposed Model Rule 1.6 as “vindication” of actions of counsel). Despite this “vindication,” as noted by Professor Susan Koniak, “The law firm paid out millions of dollars to settle civil litigation brought against it for willfully or recklessly aiding its client’s fraud.” **Error! Main Document Only.** Susan P. Koniak, *When the Hurlyburly’s Done: The Bar’s Struggle with the SEC*, 103 Colum. L. Rev. 1236, 1262 (2003).

false,” and required a lawyer who learned after the fact that he or she had offered false material evidence to take “reasonable remedial measures” “even if compliance requires disclosure of information otherwise protected by Rule 1.6.”<sup>95</sup> Five separate amendments to bar a lawyer from disclosing client perjury on the ground that this was contrary to the lawyer’s duty to keep confidences under Rule 1.6 were voted down.<sup>96</sup> The House instead adopted the Kutak Commission proposal requiring a lawyer to disclose to the tribunal false evidence, including perjurious testimony of the client.

At the completion of the Midyear Meeting, only the black letter rules had been approved. The Comments were subject to discussion at the Annual Meeting in August 1983, and in light of the changes to the Proposed Rules, several Comments needed revision. Before the meeting, Hazard and “interested opponents” met to reach agreement on the revised Comments.<sup>97</sup> The parties agreed that the Comments would state that a lawyer was required to withdraw when the lawyer’s services were to be used to further a course of crime or fraud, but that after “withdrawal the lawyer is required to refrain from making disclosure of the clients’ confidences, except as

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<sup>95</sup>*See Report of the Drafting Committee on Proposed Model Rules of Professional Conduct*, 108 A.B.A. Rep. 728, 734 (1983)(quoting Rule 3.3(a)(4) and Rule 3.3(b)).

<sup>96</sup>*See House of Delegates Proceedings Midyear Meeting*, 108 A.B.A. Rep. 332-39 (1983)(quoting proposed amendments).

<sup>97</sup>*See* Geoffrey C. Hazard, Jr., *Rectification of Client Fraud: Death and Revival of a Professional Norm*, 33 Emory L. J. 271, 302 (1984)(reporting on negotiations to revise Comments).

otherwise provided in Rule 1.6.”<sup>98</sup> Immediately following this statement was the following, proposed by Hazard: “Neither this Rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation or the like.”<sup>99</sup> Thus, the lawyer was not permitted to disclose a confidence indicating the client had or was committing a fraud, but the lawyer was permitted to signal, without disclosing a confidence, the fraud by withdrawing from representation and giving notice of others of the fact of withdrawal. This was “noisy withdrawal,” and a sophisticated entity such as a bank or other institution would understand the reason for the noisy withdrawal. Another such victory and the Kutak Commission’s opponents were undone.

The Model Rules, including Comments, were adopted by the ABA at the Annual Meeting in August 1983, supplanting the Model Code of Professional Responsibility. The ABA then began the process of convincing state authorities to adopt the Model Rules as law.

### **III. THE MODEL RULES AS LAW, VACILLATION IN THE ABA AND CORPORATE SCANDALS IN THE 1980S AND 1990S**

#### *A. Adopting the Model Rules as Law*

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<sup>98</sup>*See Report of the Drafting Committee on Proposed Model Rules of Professional Conduct*, 108 A.B.A. Rep. 1136, 1146 (1983)(quoting Comments to Rule 1.6).

<sup>99</sup>*See id.*

The vast majority of states adopted the Code of Professional Responsibility within three years of its promulgation by the ABA.<sup>100</sup> Only three had not considered adopting the Code by 1972.<sup>101</sup> The Model Rules were slower going, with just one state, New Jersey, adopting the Model Rules effective in 1984.<sup>102</sup> Six or seven states adopted the Model Rules in each of the next three years, and nine adopted it effective in 1988, for a total of 27.<sup>103</sup> Of the states that had adopted a version of the Model Rules by 1987, just three adopted Rule 1.6 without any amendment.<sup>104</sup> That disparity continued through the 1990s, with just five jurisdictions of 39 adopting Rule 1.6 without amendment by 1996.<sup>105</sup> Although some variant of the Model Rules

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<sup>100</sup>*See Report of Special Committee to Secure Adoption of the Code of Professional Responsibility*, 97 A.B.A. REP. 740, 741 (1972)(noting 43 states and the District of Columbia had adopted the Code and in four other jurisdictions Code had been approved by state bar associations and currently before the state supreme court).

<sup>101</sup>*See id.*

<sup>102</sup>*See* Geoffrey C. Hazard, Jr. and W. William Hodes with assistance by John S. Dzienkowski, *THE LAW OF LAWYERING* Appendix B (Chronological Order) (3d ed. 2007).

<sup>103</sup>*See id.*

<sup>104</sup>Kenneth F. Krach, Note, *The Client-Fraud Dilemma: A Need for Consensus*, 46 Md. L. Rev. 436, 459 n.143 (1987)(listing three states, Delaware, Missouri, and Montana as adopting Rule 1.6 without amendment and listing 14 others rejecting rule in part or whole).

<sup>105</sup>*See* H. Geoffrey Moulton, Jr., *Federalism and Choice of Law in the Regulation of Legal Ethics*, 82 Minn. L. Rev. 73, 93 n.88 (1997), *citing* NATIONAL REPORTER ON LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY (adding Alabama and Louisiana to list of

were adopted by most states by 2000, Rule 1.6 was rarely adopted without amendment. By 2002, 41 states permitted or required (37 and four, respectively) a lawyer to disclose a confidence in order to prevent a client from perpetrating a fraud that constituted a crime, and 18 states (and 19 by 2003, adding Delaware) either permitted or required a lawyer to disclose a client confidence to rectify a “substantial loss” to a third party resulting from a crime or fraud by the client in which the client used the lawyer’s services.<sup>106</sup> Although the ABA remained the dominant authority on rules of legal ethics, its policy decisions were carefully assessed by the states, and in the case of Model Rule 1.6, it was the ABA that was the outlier, not those who believed in some exceptions to client confidentiality.

#### *B. The Savings & Loan Scandals and Law Firm Settlements*

In early 1986, American Diversified Saving Bank (ADSB) was declared insolvent by the Federal Deposit Insurance Corporation (FDIC), which then operated ADSB as conservator.<sup>107</sup> ADSB had used the law firm of O’Melveny & Myers to assist it in preparing private placement memoranda for real estate syndications. ADSB owners and officers had engaged in fraud to

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jurisdictions adopting unamended Rule 1.6).

<sup>106</sup>*See Preliminary Report of the American Bar Association Task Force on Corporate Responsibility* (July 16, 2002), 58 Bus. Law. 189, 206 nn. 39 & 40 (2002)

<sup>107</sup>*See Federal Deposit Insurance Corp. v. O’Melveny & Myers*, 969 F.2d 744 (9<sup>th</sup> Cir. 1993), *rev’d and remanded*, 512 U.S. 79 (1994). The facts in this paragraph are taken from the Ninth Circuit’s opinion, which noted that certain facts remained in dispute.

cover up ADSB's unsound financial condition. After the FDIC took over the operations of ADSB, the investors in the real estate syndications complained that they had been deceived. The FDIC had independently made the same judgment, and offered to have the partnerships that controlled the investments rescind them. The investors assigned any claims they had to the FDIC, which in May 1989 sued O'Melveny for legal malpractice. Although dismissed by the district court, the Ninth Circuit reinstated the suit.

O'Melveny was not the only law firm defending itself for its work with a savings and loan found to be engaged in fraud. In April 1989, American Continental Corporation, the parent company of Lincoln Savings & Loan, declared bankruptcy.<sup>108</sup> The law firm of Jones, Day, Reavis & Pogue, one of the largest in the country, began representing Lincoln in February 1986.<sup>109</sup> It was sued by the Resolution Trust Corporation and by private parties shortly after Lincoln's failure. Its motion for summary judgment was denied in early 1992, and Jones, Day

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<sup>108</sup> A thorough study of the rise and fall of Lincoln Savings & Loan and its de facto head, Charles Keating, is Michael Binstein and Charles Bowden, *TRUST ME* (1993). A general history of the savings and loan scandal is Martin Mayer, *THE GREATEST EVER BANK ROBBERY: THE COLLAPSE OF THE SAVINGS AND LOAN INDUSTRY* (paper ed. 1992). An interesting history of the scandal written by a regulator-turned-professor is William K. Black, *THE BEST WAY TO ROB A BANK IS TO OWN ONE* (2005). Judge Stanley Sporkin heard Lincoln's regulatory challenge in *Lincoln Sav. & Loan Ass'n v. Wall*, 743 F. Supp. 901 (D.D.C. 1990).

<sup>109</sup> See Michael Binstein and Charles Bowden, *TRUST ME* 243 (1993).

settled in April 1993 with the government for \$30.5 million in cash and \$19.5 million in notes.<sup>110</sup> It paid an additional \$24 million to settle with private plaintiffs.<sup>111</sup> Sidley & Austin, a second firm hired by Lincoln, agreed to settle claims made against it by the government in late October 1991 for \$7.5 million.<sup>112</sup> And on March 1, 1992, the Office of Thrift Supervision (OTS) filed a \$275 million suit against the New York law firm of Kaye, Scholer, Fierman, Hays & Handler for violating federal regulations in its representation of Lincoln. By regulatory order, OTS barred the firm from dissolving and its partners from leaving, and required the firm to place in escrow 25% of its partners' earnings. Within a week, Kaye, Scholer settled with OTS for \$41 million.<sup>113</sup> Kaye, Scholer also paid \$20 million to private plaintiffs.<sup>114</sup>

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<sup>110</sup>See Michael Binstein and Charles Bowden, TRUST ME 417 (1993). See also James O. Johnston, Jr. & Daniel Scott Schecter, *Introduction: Kaye, Scholer and the OTS—Did Anyone Go Too Far?*, 66 S. Cal. L. Rev. 977, 984 n.30 (1993).

<sup>111</sup>Keith R. Fisher, *The Higher Calling: Regulation of Lawyers Post-Enron*, 37 U. Mich. J.L. Reform 1017, 1078 n.218 (2004).

<sup>112</sup>Id. at 1077 n.215.

<sup>113</sup>See *In re Peter M. Fishbein*, 1992 WL 560945 (O.T.S.)(March 11, 1992)(requiring Kaye, Scholer to pay \$25 million immediately and to pay remaining \$16 million in four equal annual installments beginning in December 1993).

<sup>114</sup>Keith R. Fisher, *The Higher Calling: Regulation of Lawyers Post-Enron*, 37 U. Mich. J.L. Reform 1017, 1078 n.218 (2004).



In July 1992, Washington, D.C. superlawyer Clark Clifford<sup>115</sup> and his law partner Robert Altman were indicted by the federal government and by the state of New York.<sup>116</sup> Clifford and Altman were embroiled in the BCCI scandal, in which the Bank of Commerce and Credit International was accused of money laundering, bribery, and a host of other major and minor crimes. Clifford was the chairman of First American Bank, which was allegedly secretly owned by investors in BCCI. Clifford's firm was also First American's outside counsel. Clifford's partner, Robert Altman was tried and acquitted, but Clifford and Altman paid \$5 million to settle claims against them.<sup>117</sup>

By the time the savings and loan scandal was over, “[m]ore than 30 law firms [had] paid government claims or suit settlements over misrepresentations in financial reports for those institutions.”<sup>118</sup>

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<sup>115</sup>See Joseph C. Goulden, *THE SUPERLAWYERS: THE SMALL AND POWERFUL WORLD OF THE GREAT WASHINGTON LAW FIRMS* 66-109 (1971). Clifford's own memoir is titled *COUNSEL TO THE PRESIDENT: A MEMOIR* (1991).

<sup>116</sup>See Peter Truell and Larry Gurwin, *FALSE PROFITS: THE INSIDE STORY OF BCCI, THE WORLD'S MOST CORRUPT EMPIRE* 406-07 (1992). See also *In re Clifford*, No. 92-080-E-11, 1997 WL 829314, at \*1 (F.R.B. Jan. 14, 1997).

<sup>117</sup>See James M. McCauley, *Corporate Responsibility and the Regulation of Corporate Lawyers*, 3 Rich. J. Global L. & Bus. 15, 25 n.34 (2003). Clifford was not tried due to his declining health. He died in 1998.

<sup>118</sup>Marianne M. Jennings, *The Disconnect Between and Among Legal Ethics, Business*

### *C. The ABA Standing Committee's 1991 Effort and 1992 Response*

In the midst of the savings and loan scandal, the ABA's Standing Committee on Ethics and Professional Responsibility moved to amend Model Rule 1.6 to permit a lawyer disclose a client confidence "to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used."<sup>119</sup> This, of course, was the exact language used by the Kutak Commission in Proposed Model Rule 1.6(b)(3), which the ABA House of Delegates had rejected in 1983. The Standing Committee on Ethics and Professional Responsibility acknowledged this rejection, but made its recommendation because the "noisy withdrawal" comment to Model Rule 1.6 was insufficient. Allowing a lawyer to withdraw from representation and to announce that he or she was doing so did not resolve situations the Standing Committee viewed as "unjust and inconsistent and which threaten to unfairly subject lawyers to potential civil liability and criminal prosecution."<sup>120</sup> Although the Standing Committee's initial justification for its recommendation was lawyer self-interest, its report later noted "[t]he public has difficulty understanding, and the profession difficulty explaining, why our ethical standards should require that we remain silent when third-parties are harmed as the

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*Ethics, Law, and Virtue: Learning Not to Make Ethics so Complex*, 1 U. St. Thomas L.J. 995, 1018 (2004).

<sup>119</sup>*See Report No. 2 of the Standing Committee on Ethics and Professional Responsibility*, 116:2 A.B.A. Rep. 108, 108 (1991).

<sup>120</sup>*See Report No. 2 of the Standing Committee on Ethics and Professional Responsibility*, 116:2 A.B.A. Rep. 108, 112 (1991).

result of our client's misuse of our services but we ourselves are permitted to disclose client confidences in similar circumstances to avoid harm to ourselves.”<sup>121</sup> A debate similar in tone and vigor to the 1983 debate led to a similar result, with the House of Delegates voting to reject the recommendation by a vote of 251-158.<sup>122</sup>

Having been rebuffed, the Standing Committee on Ethics and Professional Responsibility offered a reinterpretation of Model Rule 1.6 in light of Model Rules 1.2 and 1.16.<sup>123</sup> Formal Opinion 92-366, issued just a year after the House of Delegates rejected the Standing Committee's recommendation to amend Model Rule 1.6, was titled *Withdrawal when a lawyer's services will otherwise be used to perpetuate a fraud*.<sup>124</sup> As titled, the Opinion technically avoided the rejected recommendation made in 1991 by 1) speaking of withdrawal rather than formal disclosure of a client confidence and 2) speaking of current and future rather than past use of a lawyer's service to commit a fraud. In a lengthy opinion, Opinion 92-366 offered four

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<sup>121</sup>See *Report No. 2 of the Standing Committee on Ethics and Professional Responsibility*, 116:2 A.B.A. Rep. 108, 115 (1991).

<sup>122</sup>See *House of Delegates Proceedings*, 116:2 A.B.A. Rep. 16 (1991).

<sup>123</sup>Model Rule 1.2(d) stated, in part: “A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent.” Model Rule 1.16(a)(1) stated in part: “[A] lawyer shall ... withdraw from the representation of a client if: the representation will result in violation of the rules of professional conduct or other law.”

<sup>124</sup>American Bar Ass'n, Formal Op. 92-366 (August 8, 1992), *available in* Westlaw abathop database.

conclusions: 1) a lawyer *must* withdraw from representation if failure to do so would effectively assist in a continuing or future fraud by the client; 2) if continued representation is likely to assist in the fraud, a lawyer *may* withdraw from all representation (not just that related to the fraud) and *must* do so if the fact of representation “is likely to be known to and relied upon by third person to whom the continuing fraud is directed;”<sup>125</sup> 3) a lawyer *may* disavow any work product to prevent a continuing fraud even if by doing so a client confidence may inferentially be disclosed, and such disavowal may in some cases be required; and 4) if the fraud was in the past, and the lawyer did not reasonably believe the fraud would continue, the lawyer was permitted to withdraw but not to disavow any work product.

The Standing Committee acknowledged that the “innocent” lawyer may not disclose client confidences under Model Rule 1.6, but also noted that Model Rules 1.2(d) and 1.16(a)(1) required a lawyer to withdraw to avoid “assisting” a client in fraudulent conduct and to avoid violating the rules of professional conduct or other law. Thus, withdrawal was mandatory regarding any representation related to the fraud. Was “noisy withdrawal” required? Yes, if necessary to avoid violating either Model Rules 1.2(d) or 1.16(a)(1). Noisy withdrawal did not violate Model Rule 1.6, for the “confidentiality requirement of Rule 1.6 should not be interpreted so rigidly as to prevent the lawyer from undertaking to the limited extent necessary that which is required to avoid a violation of Rules 1.2(e) and 1.16(a)(1).” The Standing Committee acknowledged its interpretation of Model Rules 1.2(d) and 1.16(a)(1) created “the collateral effect of inferentially revealing a confidence,” but this “implied exception” to Model Rule 1.6

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<sup>125</sup> American Bar Ass’n, Formal Op. 92-366 (August 8, 1992).

was necessary to clarify and reconcile “contradictory text and conflicting directives,” a consequence of “the ambivalence with which the legal profession has historically approached the problem of a client determined to engage in illegal conduct.”<sup>126</sup>

Three members of the Standing Committee dissented, arguing that the majority distorted the hypothetical facts, made inference upon inference concerning the lawyer’s work product and its use by a third party, and quoted Lewis Carroll in attacking the majority’s interpretation of the text of the Model Rules.<sup>127</sup> The dissent concluded by noting that the Standing Committee’s authority was to interpret the Rules adopted by the House of Delegates, not “to torture the plain meaning and obvious intent of the Rules reflected in their language and legislative history as to supply by interpretation a result clearly and repeatedly rejected in enactment.”<sup>128</sup> Just as the Standing Committee could fairly be attacked in its effort to broaden the duty of client confidentiality in 1975 in Formal Opinion 341, so too could the Standing Committee in 1992 be fairly attacked in its efforts to allow lawyers to communicate their client’s fraud without formally disclosing a client confidence. In each instance, the Standing Committee interpreted clear

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<sup>126</sup>American Bar Ass’n, Formal Op. 92-366 (August 8, 1992).

<sup>127</sup>American Bar Ass’n, Formal Op. 92-366 (August 8, 1992)(dissenting opinion). The dissent quoted from ALICE IN WONDERLAND: “‘When I use a word,’ Humpty Dumpty said, in rather a scornful tone ‘it means just what I choose it to mean— neither more nor less.’ ‘The question is,’ said Alice, ‘whether you can make words mean so many different things.’” *See id.*

<sup>128</sup>American Bar Ass’n, Formal Op. 92-366 (August 8, 1992)(dissenting opinion).

language to suit its policy views. Not only was the ABA out of step with most states on confidentiality, its Standing Committee was out of step with its House of Delegates.

The Standing Committee made one additional half-hearted effort to reform Model Rule 1.6 when discussing in 1993 its recommendation to add a choice of law provision to the Model Rules.<sup>129</sup> It again justified its recommendation in large part based on lawyer self-interest. The Standing Committee noted, “The most compelling circumstance of a lawyer caught between conflicting ethical obligations in all likelihood is that where a lawyer has become aware of a client’s fraud committed in the course of the lawyer’s representation, and the rule of one jurisdiction with authority over the lawyer would require disclosure of the fraud and that of another jurisdiction with authority would forbid it.”<sup>130</sup> The same year, the Committee on Professional Responsibility of the Association of the Bar of the City of New York published its *Report on the Debate over Whether there should be an Exception to Confidentiality for Rectifying a Crime or Fraud*.<sup>131</sup> After retracing some of the history noted above, a majority of the Committee supported a rule of disclosure, and “[t]he entire Committee agrees that the present state of the ethical rules governing lawyers’ conduct provides little guidance to the practitioner;

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<sup>129</sup>See *Report No. 2 of the Standing Committee on Ethics and Professional Responsibility*, 118:2 A.B.A. Rep. 112 (1993).

<sup>130</sup>See *id.* at 116.

<sup>131</sup>20 Fordham Urb. L.J. 857 (1993).

the rules are confusing and contradictory, and therefore, at the very least, these rules should be clarified to provide more meaningful guidance.”<sup>132</sup>

Beginning in 1997, the ABA’s Ethics 2000 Commission assessed the Model Rules. The proposals were readied in time for the ABA’s annual meeting in August 2001.

#### **IV. PLAYING CHICKEN**

##### *A. The Fall of Enron, Sarbanes-Oxley and the ABA’s Efforts to Combat Federal Regulation of Lawyer Conduct*

By the time the ABA began discussing the Ethics 2000 Commission’s proposed changes to the Model Rules, the American Law Institute had finally adopted (in 2000) its Restatement (Third) of the Law Governing Lawyers. Section 67 of the Restatement was titled *Using or Disclosing Information to Prevent, Rectify, or Mitigate Substantial Financial Loss*. It permitted a lawyer to disclose a client confidence to prevent a crime or fraud when the lawyer believed it reasonably necessary to do so, as long as the loss was “substantial,” had not yet occurred, was to be committed by the lawyer’s client or by the client acting through a third party, and the lawyer’s services were implicated in the crime or fraud. In addition, § 67(2) declared that if the fraud had already occurred, the lawyer was permitted to disclose a client confidence as necessary to

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<sup>132</sup>*Report on the Debate over Whether there should be an Exception to Confidentiality for Rectifying a Crime or Fraud*, 20 Fordham Urb. L.J. 857, 870 (1993). That majority disagreed about whether the rule on rectifying client fraud should be permissive or mandatory. *See id.* at 877.

mitigate, prevent or rectify any loss. Its in comment (b) to § 67, the ALI indicated that over 40 jurisdictions had departed from the rule adopted in the Model Rules of Professional Conduct, but also indicated that the “issues addressed in this Section are variously treated in American jurisdictions.”<sup>133</sup>

Although not a member of the ALI Committee on the Restatement of the Law Governing Lawyers, Geoffrey Hazard was the executive director of the ALI during its discussion of the Restatement. Hazard was a member of the ABA’s Ethics 2000 Commission, and the proposals of Ethics 2000 on Model Rule 1.6 reflected in major part his proposals as Reporter for the Kutak Commission that framed the Model Rules.

As noted in the Introduction, the ABA House of Delegates rejected the two Ethics 2000 proposals permitting disclosure of client confidences: 1) “to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer’s services,” and 2) “to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud in furtherance of which the client has used the lawyer’s services.”<sup>134</sup>

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<sup>133</sup>See American Law Institute, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS cmt. b (2000), *in* PROFESSIONAL RESPONSIBILITY STANDARDS, RULES & STATUTES, 2008-2009 EDITION 782 (John S. Dzienkowski ed. 2008).

<sup>134</sup>See *Report of the Commission on Evaluation of the Rules of Professional Conduct*,



One week after the House of Delegates debate, Enron publicly announced the resignation of Jeffrey Skilling as CEO. Skilling had been on the job for just six months, and the stated justification for his decision was family reasons.<sup>135</sup> Two months later, on October 16, Enron announced a \$1.01 billion restatement of its earnings. On December 2, Enron, having publicly restated its earnings again for the years 1997-2001, filed for bankruptcy. Congress began hearings in January 2002. At the end of the month, Global Crossing filed for bankruptcy, at the time the seventh largest bankruptcy in American history. On February 14, Congressman Michael Oxley introduced a bill to regulate accounting firms.

While Congress considered what to do, 40 law professors sent a letter to SEC Chairman Harvey Pitt on March 7, 2002, urging a rule that lawyers should be required by the SEC to go to the corporate client's board of directors to disclose any current or proposed future illegal conduct "that senior management refused to rectify."<sup>136</sup> On March 28, SEC General Counsel David

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118:2 A.B.A. Rep. 257, 308 (2001).

<sup>135</sup>Kurt Eichenwald's book *CONSPIRACY OF FOOLS* (2005) offers some evidence that Skilling was concerned about his relationships with his children when he resigned, but also notes the vagueness in Skilling's statements to Kenneth Lay, the Board of Directors and his colleagues of the timing and basis of his resignation. *See id.* at 473-85. Some of the facts concerning Enron are also found in *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005).

<sup>136</sup>*See* Letter of Richard W. Painter to Harvey Pitt, March 7, 2002, at 1, *available at* <http://www.abanet.org/buslaw/corporateresponsibility/pitt.pdf> (last visited July 31, 2008).

Becker replied, noting that the SEC had not attempted to regulate the professional conduct of lawyers practicing before it since 1981, and the “strong view among the bar that these matters are more appropriately addressed by state bar rules ....”<sup>137</sup> On the same day, in what appeared to be an effort to head off greater federal regulation of lawyers, ABA President Robert Hirshon created a Task Force on Corporate Responsibility.

In late April, WorldCom CEO Bernie Ebbers resigned. In early June, Tyco CEO Dennis Kozlowski resigned under pressure and was indicted by New York for tax avoidance. This ever-widening scandal began to outrun a Congress in a hurry to create a “remedy.”

On June 18, 2002, North Carolina Senator John Edwards sent a letter to Pitt referencing the March 7 letter of law professors, and offering the opinion that a lawyer who knew of violations of securities laws “should have an obligation to inform the board of these violations.”<sup>138</sup> Edwards continued, “in view of the uncertainty surrounding current ABA and state rules,” this

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<sup>137</sup>See Letter of David Becker to Richard W. Painter, March 28, 2002, *available at* <http://www.abanet.org/buslaw/corporateresponsibility/becker.pdf> (last visited July 31, 2008).

The SEC had considered regulating the conduct of lawyers in *In re Carter & Johnson*, No. 3-5464, 1981 WL 314179 (SEC Feb. 28, 1981), but rejected the ALJ’s suspension in that case. After the ABA objected to the SEC’s claim of authority to regulate lawyers, the SEC did little concerning lawyer conduct before the SEC.

<sup>138</sup>See Letter of Sen. John Edwards to Harvey Pitt, June 18, 2002, 148 Cong. Rec. S5652.

duty of lawyers should be federally mandated.<sup>139</sup> Edwards's remarks in the Senate on the same day criticized corporate lawyers and noted, "The American Bar Association ought to take a leading role here, something they have not done thus far."<sup>140</sup> Three days earlier, the accounting and consulting firm of Arthur Andersen had been convicted in the United States District Court for the Southern District of Texas on one count of obstructing justice related to its work for Enron.<sup>141</sup> The day before Edwards sent his letter to Pitt, Tyco filed a civil suit against its former Chief Corporate Counsel, Mark Belnick.

On June 25, 2002, Democratic Senator Paul Sarbanes of Maryland introduced legislation that eventually became Sarbanes-Oxley. That bill contained no language concerning lawyers. On the same day, WorldCom publicly disclosed a \$3.8 billion restatement of its EBITDA (Earnings Before Interest, Taxes, Depreciation and Amortization), and cable and communications company Adelphia filed for bankruptcy. On July 9, the President announced the creation of a Corporate Fraud Task Force, and Deputy Attorney General Larry Thompson was named its chair.

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<sup>139</sup>*See id.*

<sup>140</sup>148 Cong. Rec. S5652 (June 18, 2002). Edwards sent a copy of this letter to the ABA, which responded on June 20, 2002. ABA President Robert Hirshon disagreed with Senator Edwards, but noted that he had appointed a Task Force to look at the ethical rules governing lawyers. *See* Letter from Robert E. Hirshon to Senator John Edwards, June 20, 2002, *available at* <http://www.abanet.org/poladv/letters/107th/business062002.html> (last visited July 31, 2008).

<sup>141</sup>*See* Arthur Andersen LLP v. United States, 544 U.S. 696 (2005).

On July 10, Senator Edwards proposed an amendment to the Sarbanes bill, which became § 307 of the Sarbanes-Oxley Act. The Edwards amendment required the SEC to adopt rules “setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of public companies ...”<sup>142</sup> within 180 days of the bill’s enactment. On July 15, 2002, the Senate adopted the amendment unanimously, 97-0, and the Sarbanes bill was adopted by the same vote that day.<sup>143</sup>

The next day, the ABA Task Force on Corporate Responsibility issued its Preliminary Report.<sup>144</sup> The Preliminary Report recommended amending Model Rule 1.13 to require the lawyer to go to a higher authority in the corporation “where the misconduct by a corporate officer, employee or agent involves crime or fraud, including violations of federal securities laws and regulations.”<sup>145</sup> This reporting “up” the corporate ladder was ostensibly the only requirement

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<sup>142</sup>148 Cong. Rec. S6559 (July 10, 2002).

<sup>143</sup>*Id.* at S6778-79 (July 15, 2002).

<sup>144</sup>*See Preliminary Report of the American Bar Association Task Force on Corporate Responsibility*, 58 Bus. Law. 189 (2002)(released July 16, 2002).

<sup>145</sup>*See id.* at 204. Ethics 2000 recommended only a “reasonably belief” change to Model Rule 1.13. *See Report of the Commission on Evaluation of the Rules of Professional Conduct*, 126:2 A.B.A. Rep. 257, 370 (2001). The ABA adopted this recommendation at its Midyear Meeting in February 2002. *See House of Delegates Proceedings*, 127:1 A.B.A. Rep. 18 (2002). The Task Force’s recommendation amending Model Rule 1.13 to allow reporting up and the possibility of reporting out was adopted by the ABA at its Annual Meeting in August 2003. *See*

of the Edwards amendment to the Sarbanes bill. As noted in the packaged “debate” concerning the Edwards amendment, Senator Sarbanes asked Senator Edwards, “It is my understanding that this amendment, which places responsibility upon the lawyer for the corporation to report up the ladder, only involves going up within the corporate structure. He doesn’t go outside of the corporate structure. So the lawyer would first go to the chief legal officer, or the chief executive officer, and if he didn’t get an appropriate response, he would go to the board of directors. Is that correct?”<sup>146</sup> Senator Edwards replied, “[T]he only obligation that this amendment creates is the obligation to report to the client, which begins with the chief legal officer, and, if that is unsuccessful, then to the board of the corporation. There is no obligation to report anything outside the client-the corporation.”<sup>147</sup>

Even though the Edwards amendment was limited, the Preliminary Report of the Task Force went beyond the requirements of the Edwards amendment. The Task Force also recommended the adoption of the two amendments to Model Rule 1.6 rejected 11 months earlier by the ABA. It did so with a twist. The Task Force recommended that Model Rule 1.6 be amended “to make disclosure mandatory.”<sup>148</sup> Not only did this go beyond the recommendation of Ethics 2000, it largely went beyond the state of the law of professional conduct in most states.

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Model Rule Prof. Cond. 1.13 (2008).

<sup>146</sup>148 Cong. Rec. S6557 (July 10, 2002).

<sup>147</sup>*See id.*

<sup>148</sup>*See Preliminary Report of the American Bar Association Task Force on Corporate Responsibility*, 58 Bus. Law. 189, 206 (2002).

Although the Task Force noted that “Forty-one states either permit or require disclosure to prevent a client from perpetuating a fraud that constitutes a crime, and eighteen states permit or require disclosure to rectify substantial loss resulting from client crime or fraud in which the client used the lawyer’s services,”<sup>149</sup> the Task Force left to the footnotes the information that just four states require disclosure in the first instance and just three states required disclosure in the second instance.<sup>150</sup> An additional justification for making disclosure necessary was the “public demand that lawyers play a greater role in promoting corporate responsibility” was “almost certainly much stronger” than public sentiment of a year earlier.<sup>151</sup>

This recommendation of the Task Force was striking, a bold effort challenging the vision of lawyering that placed client interests ahead of the interests of third parties in nearly all circumstances (as long as the “third parties” were not the lawyers themselves). Although § 67 of the ALI’s Restatement departed from the ABA’s Model Rule 1.6, it merely permitted and did not require disclosure. The 1993 report of the Committee on Professional Responsibility of the Association of the Bar of the City of New York had also concluded an exception to the rule of confidentiality to rectify client crime or fraud should exist, but its members did not reach agreement on whether such disclosure be made permissible or mandatory. This recommendation of mandatory disclosure appeared to indicate the seriousness of the ABA’s response to the raft of corporate scandals since late 2001.

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<sup>149</sup>*Id.*

<sup>150</sup>*See id.* at 206 nn.39-40 (listing jurisdictions).

<sup>151</sup>*Id.* at 207.

The difficulty with accepting the Task Force's proposals at face value (or at least the impact of those proposals on the ABA as an entity) is several fold. The timing of the issuance of the Preliminary Report, as well as its recommendation that disclosure of client confidences in fraud matters be made mandatory, suggests less a principled change of direction than a calculated effort to engage in last-minute politicking to eliminate the Edwards amendment.<sup>152</sup>

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<sup>152</sup>*Accord* Thomas D. Morgan, *Sarbanes-Oxley: A Complication, Not a Contribution, in the Effort to Improve Corporate Lawyers' Professional Conduct*, 17 Geo. J. Legal Ethics 1, 16 (2003) ("One hesitates to ascribe motives, but in the context, the urgent tone of the Preliminary Report appears in part to have been an effort to sidetrack the Edwards Amendment in the Conference Committee process by showing that the ABA had gotten the message"). For an example of the ABA's lobbying at this time, see Letter from Robert D. Evans, Director, Governmental Affairs Office, ABA to Senator Paul S. Sarbanes, July 19, 2002 *available at* <http://www.abanet.org/poladv/letters/107th/business071902.html> (last visited July 31, 2008) (opposing § 307).

In a June 20, 2002 letter from ABA President Robert Hirshon to Senator Edwards, Hirshon indicated the Preliminary Report was to be delivered at the ABA's Annual Meeting in August. *See* Letter from Robert E. Hirshon to Senator John Edwards, June 20, 2002, *available at* <http://www.abanet.org/poladv/letters/107th/business062002.html> (last visited July 31, 2008). Releasing the Preliminary Report nearly a month early and during the fight over the Edwards amendment suggests the Report was intended more for Congress than the membership of the ABA.

Second, as will be discussed in more detail below, the ABA's public comments after the SEC in November 2002 issued its proposed rules regulating lawyer conduct calculatedly ignore the Task Force recommendation, a recommendation no longer necessary once the SEC decided not to mandate but merely permit such disclosures. Third, the Final Report of the Task Force, issued on March 31, 2003, fails to explain why it now recommended permissible but not mandatory disclosures of client confidences to prevent, mitigate or rectify client frauds causing substantial harm to third persons.

In terms of last minute politicking, the ABA's efforts were bound to fail given the metastasizing of the accounting (and possibly legal) scandals since the fall of Enron. Even before the introduction by Senator Sarbanes of his bill, the bankruptcy of Global Crossing, the resignations of WorldCom CEO Bernie Ebbers, Adelphia CEO and Chairman of the Board John

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At this time everyone was getting on board. On August 1, 2002, two days after the President signed Sarbanes-Oxley into law, the Conference of Chief Justices resolved that Model Rule 1.6 be amended as recommended by the Ethics 2000 Commission. *See* Conference of Chief Justices, Resolution 35: In Support of Rule 1.6(b)(2) and 1.6(b)(3) of Ethics 2000 (Aug. 1, 2002), at <http://ccj.ncsc.dni.us/resol35RuleOneptSixEthics2000.html> (last visited July 31, 2008). Why state chief justices would care what ABA Model Rule 1.6 stated is unclear, for most states had already voiced their disagreement with the ABA's position. It appears the Chief Justices were more interested in protecting their lawyer regulation turf, and getting the ABA to relent on Model Rule 1.6 was perceived as providing an opportunity for the SEC to lessen its vigor in promulgating rules of professional conduct.



Rigas and Tyco CEO Dennis Kozlowski, and the conviction of Arthur Andersen demanded (by Congress's own lights) that it do something. On July 21, WorldCom filed for bankruptcy, the largest ever. Three days later former Adelphia CEO John Rigas was sued by SEC for fraud. That same day, July 24, the Conference Committee reached agreement on Sarbanes-Oxley, including § 307. The Act was inevitable, and the likelihood that the bill would be amended in Conference to excuse lawyers from regulatory oversight was minuscule, for it was contrary to the popular and populist anger at large corporations, the executives who profited from them, and their perceived aiders and abettors. No better sense of the inevitability of the bill was its popularity in both Houses with both parties. The bill passed in the House on July 25 by a vote of 423-3 and in the Senate by a vote of 99-0.<sup>153</sup>

The SEC had until the end of January 2003 to issue its rules regulating the conduct of lawyers pursuant to Sarbanes-Oxley. On November 21, 2002, shortly after the midterm elections and the resignation on November 5 by Harvey Pitt from the chairmanship of the SEC,<sup>154</sup> the Commission issued its Proposed Rules.<sup>155</sup> Paragraph (e)(2) of the Proposed Rules stated:

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<sup>153</sup>See 148 Cong. Rec. H5480 (July 25, 2002)(423-3, with 8 abstaining); 148 Cong. Rec. S7365 (July 25, 2002)(one member absent). The bill was signed into law on July 30, 2002. See Pub. L. 107-204, 116 Stat 745.

<sup>154</sup>See Letter from Harvey Pitt to President George W. Bush, November 5, 2002, at [http://www.usatoday.com/money/companies/regulation/2002-11-05-pitt-resignation-letter\\_x.htm](http://www.usatoday.com/money/companies/regulation/2002-11-05-pitt-resignation-letter_x.htm) (last visited July 31, 2008).

<sup>155</sup>See Implementation of Standards of Professional Conduct for Attorneys, December 2,

An attorney appearing and practicing before the Commission in the representation of an issuer may reveal to the Commission, without the issuer's consent, confidential information related to the representation to the extent the attorney reasonably believes necessary:

- (i) To prevent the issuer from committing an illegal act that the attorney reasonably believes is likely to result in substantial injury to the financial interest or property of the issuer or investors;
- (ii) To prevent the issuer from committing an illegal act that the attorney reasonably believes is likely to perpetuate a fraud upon the Commission; or
- (iii) To rectify the consequences of the issuer's illegal act in the furtherance of which the attorney's services had been used.<sup>156</sup>

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2002, 67 Fed. Reg. 71670 (Dec. 2, 2002). The date of the Proposed Standards is November 21, 2002.

<sup>156</sup>*See Implementation of Standards of Professional Conduct for Attorneys*, November 21, 2002, 67 Fed. Reg. 71670, 71692 (Dec. 2, 2002). The Final Rule, § 205.3(d)(2), differed very slightly from the proposal. It stated:

(d) Issuer confidences.

(1) Any report under this section (or the contemporaneous record thereof) or any response thereto (or the contemporaneous record thereof) may be used by an attorney in connection with any investigation, proceeding, or litigation in which the attorney's compliance with this part is in issue.

As noted by the SEC, its proposed paragraph (e)(2) was essentially the proposed Model Rule 1.6 of both the Kutak Commission and the Ethics 2000 Commission, both rejected by the ABA House of Delegates. The SEC's proposed paragraph (e)(2) made disclosure of client confidences permissive, not mandatory. The SEC noted that a few states made such disclosures mandatory, and further noted the Preliminary Report of the ABA Task Force on Corporate Responsibility made the same recommendation in amending Model Rule 1.6. However, the SEC

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(2) An attorney appearing and practicing before the Commission in the representation of an issuer may reveal to the Commission, without the issuer's consent, confidential information related to the representation to the extent the attorney reasonably believes necessary:

- (i) To prevent the issuer from committing a material violation that is likely to cause substantial injury to the financial interest or property of the issuer or investors;
- (ii) To prevent the issuer, in a Commission investigation or administrative proceeding from committing perjury, proscribed in 18 U.S.C. 1621; suborning perjury, proscribed in 18 U.S.C. 1622; or committing any act proscribed in 18 U.S.C. 1001 that is likely to perpetrate a fraud upon the Commission; or
- (iii) To rectify the consequences of a material violation by the issuer that caused, or may cause, substantial injury to the financial interest or property of the issuer or investors in the furtherance of which the attorney's services were used.

concluded that mandatory disclosure did not appear necessary because “[t]he ‘noisy withdrawal’ provision in Section 205.3(d) probably makes permissive disclosure of confidential information under the circumstances of Section 205.3(e) sufficient to protect investors.”<sup>157</sup> Noisy withdrawal had specifically been permitted when Professor Hazard, as Reporter for the Kutak Commission, and other parties negotiated the comments to the Model Rules in 1983. Comment 15 to Model Rule 1.6 stated in part: “Neither this Rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of the withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, disaffirmation, or the like.”<sup>158</sup> The difference between comment 15 to Model Rule 1.6 and the Proposed Rules of the SEC was the latter made noisy withdrawal mandatory in cases when a lawyer had reported evidence of a material violation to a representative of the corporate client, but had received neither a response nor an appropriate response, and the violation was ongoing and likely to result in substantial injury to the financial interests of a third party.<sup>159</sup> Thus, even if a lawyer chose not to disclose a client confidence, as was permitted under the SEC’s Proposed Rules, a lawyer was required in some circumstances to

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<sup>157</sup>*See Implementation of Standards of Professional Conduct for Attorneys*, November 21, 2002, 67 Fed. Reg. 71670, 71693 (Dec. 2, 2002). Noisy withdrawal, in Proposed Section 205.3(d), required public disaffirmance of previous opinions and withdrawal from representation, similar to then-existing cmt. 15 to Model Rule 1.6 and Model Rules 1.13 on entity representation and 1.16 on required withdrawal from representation.

<sup>158</sup>*See* Model Rule Prof. Cond. 1.6 cmt. 15 (2001).

<sup>159</sup>*See Implementation of Standards of Professional Conduct for Attorneys*, November 21, 2002, 67 Fed. Reg. 71670, 71688-89 (Dec. 2, 2002)(stating Proposed Rule 205.3(d)(1)).

withdraw from representation, and do so “noisily,” thus sending a signal to third persons to be alert in engaging in any transaction with the lawyer’s former client.

The ABA’s initial response to the SEC’s Proposed Rules was sent by letter dated December 18, 2002.<sup>160</sup> It noted the Proposed Rules affected a number of Model Rules. With particular reference to Model Rule 1.6, the ABA limited itself initially to the statement that the Task Force on Corporate Responsibility was assessing whether to recommend amendments to that Rule.<sup>161</sup> It made no mention of the recommendation in the Preliminary Report of the Task Force that disclosures related to client fraud be mandatory. Indeed, in discussing the duties of a lawyer fired from representation to disclose a “material violation,” the ABA opposed any “mandatory” duty of the discharged lawyer to “report up,” that is, to disclose that evidence to the board. It also opposed any duty to “report out,” that is, to report evidence of material violations to the SEC.<sup>162</sup>

When discussing whether an exception to the duty of confidentiality should exist for client (or issuer) financial fraud, the December 18, 2002 letter simply misled the reader about the Task Force’s Preliminary Report recommendations. The ABA noted that “many jurisdictions

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<sup>160</sup>See Letter of Alfred P. Carlton, Jr. to Securities and Exchange Commission, December 18, 2002, *available at* <http://www.abanet.org/buslaw/committees/CL410000pub/comments/20021218000000.pdf> (last visited July 31, 2008).

<sup>161</sup>See *id.* at 9.

<sup>162</sup>See *id.* at 24.

*permit* disclosure of client confidences to the extent necessary to prevent, mitigate or rectify the consequences of a client crime or fraud ....”<sup>163</sup> It then declared that the Task Force “in its preliminary report has recommended that the Association again consider the ABA Ethics 2000 Commission’s proposals to amend the Model Rules to allow similar disclosures.”<sup>164</sup> But the Preliminary Report of the Task Force had not simply urged a reconsideration of the Ethics 2000 proposals; it recommended those proposals on disclosing client confidences be made mandatory, which Ethics 2000 had not recommended.

The ABA had taken advantage of the SEC’s decision to make disclosure of client confidences permissive rather than mandatory. The Preliminary Report recommendations of the Task Force that 1) Model Rule 1.6 be amended and 2) exceptions to the duty of confidentiality be made mandatory were offered when the ABA was battling against the adoption of § 307. Once the SEC issued its Proposed Rules and proposed making disclosures of client confidences permissive, not mandatory, any need to propose mandatory disclosures had disappeared. Seeing an opening, the ABA’s response to the Proposed Rules focused in part on perceived threats to the attorney-client privilege, noting that noisy withdrawal and disclosure of confidences might constitute a waiver of the privilege.<sup>165</sup> The ABA correctly noted that a declaration by the SEC that noisy withdrawal and limited disclosure of client confidences was not a waiver of the privilege might not be respected by the courts. Consequently, the ABA urged the SEC to wait

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<sup>163</sup>*See id.* at 25 (emphasis in original).

<sup>164</sup>*See id.* at 26.

<sup>165</sup>*See id.* at 32.

until receiving express congressional authorization before writing rules on noisy withdrawal, disaffirmation of work product and exceptions to confidentiality.<sup>166</sup> Waiting for congressional approval, of course, greatly lessened any chance the SEC would embrace a role in guiding lawyer conduct, for Congress had already expressed its bipartisan “outrage,” and had no need to return to that issue. Urging the SEC to wait for congressional permission gave the ABA time to reassert the notion that lawyers were best regulated internally.

When the SEC issued its Final Rules on Lawyer Conduct on January 29, 2003,<sup>167</sup> it eliminated its “noisy withdrawal” proposals, but invited further comment on that issue.<sup>168</sup> It kept

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<sup>166</sup>*See id.* at 33.

<sup>167</sup>*Implementation of Standards of Professional Conduct for Attorneys (Final Rule)*, January 29, 2003, 68 Fed. Reg. 6926 (Feb. 6, 2003), codified at 17 C.F.R. Part 205 (2008).

<sup>168</sup>*See Implementation of Standards of Professional Conduct for Attorneys (Final Rule)*, January 29, 2003, 68 Fed. Reg. 6296, 6297 (Feb. 6, 2003). The SEC invited comments on a Proposed Rule § 205.3(e)(1), which would have required the *issuer* to give notice to the SEC of an attorney’s withdrawal from representation, but this proposal was eliminated from the Final Rules implemented in August 2003. *See Implementation of Standards of Professional Conduct for Attorneys (Proposed Rule)*, January 29, 2003, 68 Fed. Reg. 6324, 6329 (Feb. 6, 2003)(citing proposed “noisy withdrawal” provision requiring issuer but not attorney to provide notice of attorney withdrawal). Proposed Rule 205.3(d)(1) in the November 21, 2002 Proposed Rules required a noisy withdrawal, but, as the SEC noted, “Paragraph (d)(1), however, does not require even an outside attorney retained by the issuer to disclose evidence of the reported material

as permissive the exceptions to the duty of confidentiality.<sup>169</sup> The problem created by the deletion of the noisy withdrawal provisions was that the SEC's stated basis for making the exceptions to confidentiality permissive rather than mandatory was that the mandatory "'noisy withdrawal' provision in Section 205.3(d) probably makes permissive disclosure of confidential information ... sufficient to protect investors."<sup>170</sup> The SEC offered no explanation why exceptions to client confidences should remain permissive after eliminating any "noisy withdrawal" provision, including any mandatory noisy withdrawal. Nor did the SEC cite the Preliminary Report of the ABA Task Force on Corporate Responsibility in its Final Rule, as it had in its November 21, 2002 release.

The constituent parts of the ABA took full advantage of its opportunity to take the offensive. The Final Report of the ABA Task Force was completed on March 31, 2003.<sup>171</sup> It triumphantly declared, "The Model Rules' treatment of the lawyer's obligation of confidentiality

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violation, only to make a 'noisy withdrawal.'"<sup>172</sup> *See Implementation of Standards of Professional Conduct for Attorney (Proposed Rule)*, November 21, 2002, 67 Fed. Reg. 71670, 71689 (Dec. 2, 2002). On noisy withdrawal and the SEC, see generally Roger C. Cramton, George M. Cohen and Susan P. Koniak, *Legal and Ethical Duties of Lawyers after Sarbanes-Oxley*, 49 Vill. L. Rev. 725 (2004).

<sup>169</sup>See 17 C.F.R. § 205.3(d)(2) (2008).

<sup>170</sup>See *Implementation of Standards of Professional Conduct for Attorneys*, November 21, 2002, 67 Fed. Reg. 71670, 71693 (Dec. 2, 2002)

<sup>171</sup>See *Report of the American Bar Association Task Force on Corporate Responsibility*, 59 Bus. Law. 145, 172-74 (2003)(dated March 31, 2003).



is significantly out of step with the policy balance reflected in the rules of professional conduct in most of the states, in Section 67 of the Restatement (Third) of the Law Governing Lawyers, and in the recommendations of the ABA Commission on Evaluation of the Rules of Professional Conduct ('Ethics 2000 Commission')."<sup>172</sup> The Task Force then urged the ABA to reconsider the Ethics 2000 recommendations amending Model Rule 1.6. Of course, Ethics 2000 recommended permissive disclosure, which the Preliminary Report of the Task Force had rejected. In its Final Report, the Task Force made no mention why it no longer supported mandatory disclosure of client confidences in cases involving client fraud. It was as if that recommendation had never existed. This switch, along with an absence of reasoning explaining this shift, strongly suggests it never intended for its initial recommendations to become the ABA's "official" position.

On April 2, 2003, the ABA sent a letter to the SEC with additional comments concerning "noisy withdrawal" and other measures upon which comment was invited. The letter noted the Preliminary Report of the Task Force, and reminded the SEC the Task Force was given the charge to "propose changes in the ABA's Model Rules of Professional Conduct."<sup>173</sup> Interestingly, though the Final Report was dated Monday, March 31, the letter sent by the ABA on Wednesday, April 2 did not mention the Final Report. This allowed the ABA to avoid explaining why the Task Force had changed its mind regarding the amendments to Model Rule

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<sup>172</sup>*Id.* at 172.

<sup>173</sup>*See* Letter of Alfred P. Carlton, Jr., to SEC, April 2, 2003, at 2, *available at* <http://www.abanet.org/buslaw/committees/CL410000pub/comments/20030402000000.pdf> (cite for April 2, 2003 letter of ABA to SEC)

1.6. The ABA letter indicated that it would provide the SEC a copy of the Final Report when available. The letter also expressed the ABA's continued objection to "noisy withdrawal." The SEC has made no further changes to its Rules of Professional Conduct.

In August 2003, the ABA did what it had to, though just 52% of the delegates agreed to amend Model Rule 1.6.<sup>174</sup> Despite the fact that this issue had been debated on and off within the ABA for nearly a quarter-century, and despite the fact that the ABA's position was clearly a minority position, and despite the fact that the House of Delegates barely passed these amendments, the *ABA Journal* titled its report on this decision as "The Non-Revolution."<sup>175</sup>

Having successfully managed to avoid overarching federal regulation of the conduct of lawyers through SEC regulations, the ABA in mid-2004 began its efforts challenging the DOJ's

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<sup>174</sup>See Roger C. Cramton, George M. Cohen and Susan P. Koniak, *Legal and Ethical Duties of Lawyers after Sarbanes-Oxley*, 49 Vill. L. Rev. 725, 732 n.33 (2004)(noting vote to amend Rule 1.6 was 218-201). The House of Delegates agreed to amend Model Rule 1.13 as well, by a similarly close vote. *See id.*

<sup>175</sup>See James Podgers, *The Non-Revolution*, ABA J., October 2003, at 80. The amendments to the black letter rules were not the only changes made by the House of Delegates. The comments to the Model Rules were also amended. Comment 15 to Model Rule 1.6, which provided for noisy withdrawal, was deleted. Instead, the ABA added the following statement to Comment 3 to Model Rule 4.1: "Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like." *See* Model Rule Prof. Cond. 4.1 cmt. 3 (2008).

use of waiver of the attorney-client privilege in determining whether to request an indictment of a corporation.

*B. The DOJ and Waiver of the Attorney-Corporate Client Privilege*

In 1999, the Department of Justice issued the Holder Memorandum.<sup>176</sup> The Holder Memorandum set forth a list of eight factors to aid prosecutors in determining whether to indict a corporation. The fourth factor was “[t]he corporation’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of the corporate attorney-client and work product privileges.”<sup>177</sup> Although the Holder Memorandum noted that the factors were not “outcome-determinative and are only guidelines,” the Holder Memorandum was influential for federal prosecutors making charging decisions regarding corporations, which traditionally had not been indicted.

On January 20, 2003, the Department of Justice issued the Thompson Memorandum,<sup>178</sup> named after Deputy Attorney General Larry Thompson. Thompson was the chair of the Corporate Fraud Task Force and was responsible for the investigation of Enron after Attorney

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<sup>176</sup>Holder Memorandum, *available at* <http://www.usdoj.gov/criminal/fraud/docs/reports/1999/chargingcorps.html> (last visited July 31, 2008).

<sup>177</sup>*Id.* at 3. Technically, it is the work product doctrine, ordinarily related to discovery in civil cases, and not a privilege. The Thompson Memorandum corrected this error.

<sup>178</sup>Thompson Memorandum, *available at* [http://www.usdoj.gov/dag/cftf/corporate\\_guidelines.htm](http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm) (last visited July 31, 2008).

General John Ashcroft recused himself on conflict of interest grounds.<sup>179</sup> The Thompson Memorandum replaced the Holder Memorandum, although it kept nearly all of the former's factors and considerations.<sup>180</sup> The fourth factor listed in the Holder memorandum, which concerned the effect of cooperation, including waiver of the attorney-client privilege, was repeated nearly verbatim in the Thompson Memorandum.<sup>181</sup> The explanation of this factor in the Thompson Memorandum largely mirrors the justifications made in the Holder Memorandum. Section VI of both Memorandums states that the extent of the corporation's cooperation may be gauged by looking at a corporation's willingness to identify the culprits, make witnesses available, "to disclose the complete results of its internal investigation; and to waive attorney-client and work product protection."<sup>182</sup> The justification for waiver of the attorney-client privilege and work product protection concerned the "completeness" of the disclosure, for

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<sup>179</sup>See Kurt Eichenwald, CONSPIRACY OF FOOLS 648-49 (2005)(noting Ashcroft's recusal and assignment of duties to Thompson).

<sup>180</sup>The Holder Memorandum consisted of eight factors while the Thompson Memorandum consisted of nine factors. The first six factors were nearly identical. The remaining three factors in the Thompson Memorandum merely stated more clearly and fully the last two factors of the Holder Memorandum. *Compare* Holder Memorandum at 3-4 *with* Thompson Memorandum at 2-3 (listing factors).

<sup>181</sup>The Thompson Memorandum corrected the language of "work product privilege" by referring to "the waiver of corporate attorney-client and work product protection." See Thompson Memorandum at 3.

<sup>182</sup>*Id.* at 5.

“[s]uch waivers permit the government to obtain statements of possible witnesses, subjects, and targets, without having to negotiate individual cooperation or immunity agreements” and “they are often critical in enabling the government to evaluate the completeness of a corporation’s voluntary disclosure and cooperation.”<sup>183</sup> Prosecutors could request the corporation waive the privilege, but the DOJ did not “consider waiver of a corporation’s attorney-client and work product protection an absolute requirement, and prosecutors should consider the willingness of a corporation to waive such protection when necessary to provide timely and complete information as only one factor in evaluating the corporation’s cooperation.”<sup>184</sup> Finally, footnote 3 to the Thompson memorandum states, “Except in unusual circumstances, prosecutors should not seek a waiver with respect to communications and work product related to advice concerning the government’s criminal investigation.”<sup>185</sup> The most important difference between the Holder Memorandum and the Thompson memorandum was that the latter was binding on all federal prosecutors.<sup>186</sup>

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<sup>183</sup>*Id.* This language is taken directly from the Holder Memorandum. *See* Holder Memorandum at 7.

<sup>184</sup>Thompson Memorandum at 5. This language is modified only slightly from the Holder Memorandum, which collapsed the distinction between attorney-client privilege and the work product doctrine. *See* Holder Memorandum at 13 n.2.

<sup>185</sup>Thompson Memorandum at 10 n.3. This language is taken directly from the Holder Memorandum. *See* Holder Memorandum at 13 n.2.

<sup>186</sup>*See* *United States v. Stein*, 435 F. Supp.2d 330, 338 n.12 (S.D.N.Y. 2006).

Although the Thompson Memorandum largely echoed the factors and policy justifications listed in the Holder Memorandum, it was issued on the heels of the astonishing bankruptcies of Enron, Global Crossing, WorldCom and Adelphia, the indictment of former officers at Tyco and the adoption of the Sarbanes-Oxley Act. As a consequence, the Thompson Memorandum began making its way to the forefront of many lawyers' minds. It did not do so immediately, however. The ABA did not take notice of the Thompson Memorandum until late 2004 over 18 months after it was issued, and over five years after its nearly identical predecessor (in terms of waiver of the privilege and work product protection) was adopted by the DOJ.

One year after the DOJ issued the Thompson Memorandum, the United States Sentencing Commission proposed adding a reference in the Commentary to Sentencing Guideline § 8C2.5 stating, "Waiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score ... unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization."<sup>187</sup> This proposal followed the approach taken in the Holder and Thompson Memorandums regarding the purpose and impact of any waiver of the attorney-client privilege. The additional Commentary was to be added in November 2004.

In August 2004, the ABA House of Delegates adopted Recommendation 303 which, among other objections, requested the Sentencing Commission amend its Commentary to state that waiver of the attorney-client privilege and work product doctrine "should not be a factor in

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<sup>187</sup>See UNITED STATES SENTENCING COMM'N SENTENCING GUIDELINES, § 8C2.5 Commentary to Note 12 (2004), withdrawn effective November 1, 2006.

determining whether a sentencing reduction is warranted for cooperation with the government.”<sup>188</sup> Recommendation 303 did not challenge the Thompson Memorandum. In September 2004, ABA President Robert Grey appointed a Task Force on Attorney-Client Privilege. The Task Force returned with a report eight months later in May 2005.<sup>189</sup> The Task Force recommended adoption of three combined resolutions, the first supporting the attorney-client privilege, the second opposing its erosion, and the third opposing “the routine practice by government officials of seeking to obtain a waiver of the attorney-client privilege or work product doctrine through the granting or denial of any benefit or advantage.”<sup>190</sup> As resolutions go, it was hard to disagree with. Even the Thompson Memorandum noted that waiver of the privilege and work product was not mandatory if a corporation wished to avoid indictment.

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<sup>188</sup>See *Report of the Task Force on the Attorney-Client Privilege*, at 1 n.1 (August 2006), available at [http://www.abanet.org/buslaw/attorneycleitn/materials/hod/empights\\_report\\_adopied.pdf](http://www.abanet.org/buslaw/attorneycleitn/materials/hod/empights_report_adopied.pdf) (last visited July 31, 2008)(quoting part of Recommendation 303 adopted at Annual Meeting in August 2004).

<sup>189</sup>See *Report of the American Bar Association’s Task Force on the Attorney-Client Privilege*, 60 Bus. Law. 1029 (2005).

<sup>190</sup>See Recommendation 111, available at [http://www.abanet.org/buslaw/attorneyclient/materials/hod/recommendation\\_adopied.pdf](http://www.abanet.org/buslaw/attorneyclient/materials/hod/recommendation_adopied.pdf) (last visited July 31, 2008). This Recommendation was adopted at the Annual Meeting in August 2005.

Requiring waiver of the privilege as a “routine practice” was the antithesis of the discretion required of prosecutors investigating corporate malfeasance under the Thompson Memorandum.

The Task Force ominously declared that it had “heard from a variety of sources that, whether made overtly or implicitly, these requests [for waiver], backed by an express or implied threat of harsh treatment for refusing, have become increasingly common.”<sup>191</sup> If true, this was a damning indictment of the government. As the largest organization of lawyers in the world, surely the ABA had the duty to do more than adopt several uninspiring resolutions. Unfortunately, the ABA’s evidence consisted of no citations to any specific event or case. Instead, the Task Force cited two other reports, one from the Association of Corporate Counsel (formerly the American Corporate Counsel Association), a group of in-house lawyers, and the other written on behalf of the ABA Criminal Justice Section. Both reports pitched their accusations at a high level of generality, offering nothing in the way of specific abuses of power by prosecutors or others. It was certainly possible that the agents of the government were abusing their prosecutorial powers, but the evidence was lacking.

The ABA Task Force’s criticism of the Thompson Memorandum also failed to note that the language concerning waiver of the attorney-client privilege was taken nearly verbatim from the Holder Memorandum of 1999. It implied that the Thompson Memorandum had been a direct response to President Bush’s call “after the collapse of Enron for more vigorous prosecutions of

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<sup>191</sup>*See Report of the American Bar Association’s Task Force on the Attorney-Client Privilege*, 60 Bus. Law. 1029, 1044 (2005).



corporations.”<sup>192</sup> The Task Force further criticized the DOJ for failing to issue internal guidelines “interpreting the purpose of this policy, when it is to be applied and what safeguards should be in place to prevent abuse at the local level.”<sup>193</sup>

The other target of the Task Force was the SEC, which it criticized for its 2001 Seaboard Report.<sup>194</sup> The Seaboard Report chose not to take action against a parent company for an employee’s accounting fraud involving a subsidiary, and listed “some of the criteria we will consider in determining whether, and how much, to credit self-policing, self-reporting, remediation and cooperation—from the extraordinary step of taking no enforcement action to bringing reduced charges, seeking lighter sanctions, or including mitigating language in documents we use to announce and resolve enforcement actions.”<sup>195</sup> The Report listed 13 criteria, many of which included more than one question for consideration. Criterion 11 asked a number of questions, ending with “Did the company voluntarily disclose information our staff did not directly request and otherwise might not have uncovered? Did the company ask its employees to cooperate with our staff and make all reasonable efforts to secure such

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<sup>192</sup>*Id.*

<sup>193</sup>*Id.* at 1045.

<sup>194</sup>*See Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions*, Exch. Act Rel. No. 44969 (Oct. 23, 2001), available at <http://www.sec.gov/litigation/investreport/34-44969.htm> (last visited July 31, 2008).

<sup>195</sup>*See id.*

cooperation?”<sup>196</sup> After this final question the SEC included footnote 3, which stated in part, “In some cases, the desire to provide information to the Commission staff may cause companies to consider choosing not to assert the attorney-client privilege, the work product protection and other privileges, protections and exemptions with respect to the Commission.”<sup>197</sup>

One curiosity with the criticism of the SEC’s Seaboard Report by the Task Force on Attorney-Client Privilege was the length of time it took for the ABA to level it. The Seaboard Report was released on October 23, 2001. It took nearly four years for the ABA, or at least its

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<sup>196</sup>*Id.*

<sup>197</sup>*See id.* at n.3. The remainder of footnote 3 stated:

The Commission recognizes that these privileges, protections and exemptions serve important social interests. In this regard, the Commission does not view a company's waiver of a privilege as an end in itself, but only as a means (where necessary) to provide relevant and sometimes critical information to the Commission staff. Thus, the Commission recently filed an *amicus* brief arguing that the provision of privileged information to the Commission staff pursuant to a confidentiality agreement did not necessarily waive the privilege as to third parties. *Brief of SEC as Amicus Curiae, McKesson HBOC, Inc.*, No. 99-C-7980-3 (Ga. Ct. App. Filed May 13, 2001). Moreover, in certain circumstances, the Commission staff has agreed that a witness’ production of privileged information would not constitute a subject matter waiver that would entitle the staff to receive further privileged information.

Task Force, to voice its discontent with the Seaboard Report's consideration of a company's waiver of the attorney-client privilege as helpful in the SEC's determination regarding whether to file charges.<sup>198</sup> Of course, in October 2001, the September 11 attacks remained fresh in American memory, and Enron was beginning its rapid descent, which began the perceived assault on the ABA's Model Rules. Now, two years after the implementation of the very modest lawyer conduct rules by the SEC, the ABA was emboldened to attack what was now a four-year old policy.

The Commentary to note 12 of § 8C2.5 of the Sentencing Guidelines concerning the effect of waiver of attorney-client privilege and work product did not last. After demands by the ABA and threats by Congress, on April 5, 2006, the Sentencing Commission agreed to delete the Commentary as of November 1, 2006 over the objection of the DOJ.<sup>199</sup> This Commentary was in

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<sup>198</sup>Official ABA policy is set by its House of Delegates. Consequently, the Recommendations adopted by the ABA are official policy. Reports of bodies such as the Task Force do not constitute official ABA policy unless adopted by the ABA.

<sup>199</sup>See Terry Carter, *Privilege Waiver Policy Dumped*, 5 No. 15 ABA J. E-Report 2 (April 14, 2006). The Sentencing Guidelines were also subject to scrutiny in the Supreme Court at this time. In *United States v. Booker*, 543 U.S. 220 (2005), released on January 12, 2005, the Court held that the Federal Sentencing Guidelines were subject to the jury trial requirement of the Sixth Amendment, requiring the proof of any fact used to determine a defendant's sentence, and held that the Sentencing Guidelines were no longer mandatory. *Booker* followed the Court's decision the previous Term in *Blakely v. Washington*, 542 U.S. 296 (2004), which held that the increase

effect for just two years.

A bigger victory for those opposed to the perceived inroads on the attorney-corporate client privilege occurred two months later. On June 26, 2006, the Southern District of New York held the provision in the Thompson Memorandum that stated that payment of an employee's attorney fees would be considered a lack of cooperation on part of employer when considering whether to indict the corporate employer was unconstitutional, because it violated the substantive due process rights of employees as well as their right to counsel.<sup>200</sup> *Stein* did appear to be a case of government overreaching, and now the ABA and others had an example of coercive tactics by the government undermining the rights and liberties of its citizenry. The *Stein* case humanized the ABA's growing attack on the Thompson Memorandum. Holder and Thompson listed factors that aided a prosecutor in determining whether to charge a corporation with a crime. Before *Stein*, the ABA's arguments against the Thompson Memorandum were "internal" arguments of policy, hard to sell to the public. Now the ABA could charge the Thompson Memorandum with infringing on the constitutional rights of a human being, and the hard sell became that much easier. With great timing, the ABA had, on May 2, 2006, less than two months before the *Stein* opinion was released, formally requested Attorney General Alberto Gonzales to amend the Thompson Memorandum.<sup>201</sup>

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in a defendant's sentence in state court based on a finding that the defendant acted with deliberate cruelty, a fact not adduced at the trial, violated the Sixth Amendment.

<sup>200</sup>United States v. Stein, 435 F.Supp.2d 330 (S.D.N.Y. 2006).

<sup>201</sup>*See Report of the Task Force on the Attorney-Client Privilege*, August 2006, at 2,

When the ABA met in August 2006, the latest Task Force report majestically concluded that the Thompson Memorandum “as well as similar practices instituted by civil enforcement authorities, have contributed to an erosion of these *individual* rights.”<sup>202</sup> An attack on *individual* rights gave the impression that the federal government was hounding human beings, not just the legal persons corporations were in law. Further, because cooperation by an organization often began before any person was criminally charged, “the manner in which the Thompson Memorandum has at times been implemented conflicts with the most basic American legal principle that defendants (and potential defendants) are innocent until proven guilty.”<sup>203</sup> In addition to *Stein*, the ABA Task Force claimed evidence of the government’s assault on individual rights was found in a “detailed survey, containing responses from over 1,200 in-house and outside corporate counsel.”<sup>204</sup> One claim made by counsel responding to the questions in the survey<sup>205</sup> was that the government had created a “culture of waiver,” in which it expected corporations to waive the privilege to show cooperation. One great difficulty with using this survey as evidence of the infamy of the Thompson Memorandum is its wholly non-scientific character. The survey was “open” for two weeks to partners of the ABA’s Task Force on

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available at [http://www.abanet.org/buslaw/attorneyclient/materials/hod/emprights\\_adopted.pdf](http://www.abanet.org/buslaw/attorneyclient/materials/hod/emprights_adopted.pdf) (last visited July 31, 2008).

<sup>202</sup>*Id.* at 3 (emphasis added).

<sup>203</sup>*Id.* at 16.

<sup>204</sup>*Id.* at 6 n.18.

<sup>205</sup>*The Decline of the Attorney-Client Privilege in the Corporate Context*, March 2006, <http://www.acc.com/Surveys/attyclient2.pdf> (last visited July 31, 2008).

Attorney-Client Privilege, to members of the National Association of Criminal Defense Lawyers, the Business Law and Criminal Law sections of the ABA, and members of the Association of Corporate Counsel, among others. Self-selected (not randomly selected) members of that group filled in the web-based survey.<sup>206</sup> The goal of the coalition conducting this survey was to persuade the Sentencing Commission to eliminate its Commentary to § 8C2.5 adopted in 2004. (It was later that this survey was used to attack the Thompson Memorandum.) A self-interested group surveyed (in a very broad sense) self-interested members of that group to determine whether those members were troubled by a government policy they were already committed to overturning. How could anyone take the results of this survey seriously? Or present it as evidence of a failed governmental policy? It would have taken a miracle for the survey to indicate that a governmental “culture of waiver” did not exist, given both the goal of the survey and the composition of the respondents to the survey.

On September 5, 2006, a number of “former senior Justice Department officials” wrote to Attorney General Alberto Gonzales indicating agreement with the ABA and concluding that “the Thompson Memorandum is seriously flawed and undermines, rather than enhances, compliance with the law.”<sup>207</sup> These officials urged amending the Thompson Memorandum to “state

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<sup>206</sup>*Id.* at 2-3 n.7 (noting to whom survey sent and how responses were generated).

<sup>207</sup>*See* Letter from Griffin B. Bell *et al.* to the Honorable Alberto Gonzales, September 5, 2006, *available at*

[http://www.abanet.org/poladv/priorities/privilegewaiver/2007jul30\\_privwaiv\\_frmrdojb\\_1.pdf](http://www.abanet.org/poladv/priorities/privilegewaiver/2007jul30_privwaiv_frmrdojb_1.pdf)

(including 2006 letter as attachment to July 30, 2007 letter from Stuart Gerson to the Honorable

affirmatively that waiver of attorney-client privilege and work-product protections should not be a factor in determining whether an organization has cooperated with the government in an investigation.”<sup>208</sup> The naked appeal to authority (“former senior Justice Department officials”) excused the ABA from adducing real evidence of the perversity of the Thompson Memorandum, which, after all, had largely adopted the language of the Holder Memorandum from 1999.

Despite the slender evidence supporting its attacks on the Thompson Memorandum, the ABA Task Force had several things going for it in mid-2006. First, the memory of the corporate scandals was fast fading.<sup>209</sup> Second, traditional American distrust of government made palatable the claim that the government was unfairly seeking corporate convictions.<sup>210</sup> Third, members of

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Patrick Leahy *et al.*) (last visited July 31, 2008).

<sup>208</sup> *Id.*

<sup>209</sup> I believe this is the case even though it wasn’t until May 25, 2006 that Enron’s former chairman Kenneth Lay and former CEO Jeffrey Skilling were convicted.

<sup>210</sup> For example, by August 2006, the Supreme Court had issued three opinions concerning the federal government’s detention of alleged terrorists and had in several respects roundly criticized the government’s justifications. *See Hamdi v. Rumsfeld*, 542 U.S. 507 (2004)(holding American citizen has due process right to fair hearing as enemy combatant); *Rasul v. Bush*, 542 U.S. 466 (2004)(holding aliens held by government at naval base at Guantanamo Bay, Cuba, could bring suits contesting legality and conditions of confinement); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006)(holding adoption by Congress of the Detainee Treatment Act did not deprive Court of jurisdiction to hear cases involving enemy combatants).

Congress perceived an opportunity to make political hay to “protect” the embattled attorney-client privilege from governmental abuses in a mid-term election year.<sup>211</sup> The Senate Judiciary Committee held a hearing in September 2006 “on the Justice Department’s cooperation standards and the effect these standards have on the right to counsel.”<sup>212</sup>

The November 2006 midterm elections, like most for the party holding executive office, were disastrous. The Democratic Party took control of both Houses. On December 7, 2006, during the lame duck congressional session, Republican Pennsylvania Senator Arlen Specter, the outgoing Chairman of the Senate Judiciary Committee, informally introduced a bill to protect the attorney-client privilege, called the “Attorney-Client Privilege Protection Act of 2006.”<sup>213</sup> This

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<sup>211</sup>This political rush began even before 2006. *See, e.g., Remarks of F. James Sensenbrenner, Jr., Chairman, House Committee on the Judiciary, at “Erosion of the Attorney-Client Privilege: What Does the Future Hold?”*, November 16, 2005, *available at* <http://www.abanet.org/poladv/documents/acprivsensenbrenner11-16-05.pdf> (last visited July 31, 2008)(lauding attorney-client privilege and noting DOJ no longer conditioning waiver as a condition for receiving departure from Sentencing Guidelines). Senator Arlen Specter, then the Chairman of the Senate Judiciary Committee, also made a speech to the United States Chamber of Commerce that day at the same Conference.

<sup>212</sup>*See ABA Urges Support for Attorney-Client Privilege Legislation*, *available at* <http://www.abanet.org/media/youraba/200707/article09.html> (last visited July 31, 2008).

<sup>213</sup>*See* 152 Cong. Rec. S11438-39 (Dec. 7, 2006). A copy of the bill is also found at <http://www.abanet.org/media/docs/acppa06.pdf> (last visited July 31, 2008). *See also* <http://www.abanet.org/media/youraba/200612/article01.html> (reporting introduction of bill on



bill would bar federal prosecutors from demanding or requesting, directly or indirectly, that companies waive the attorney-client privilege or work product protections during an investigation, or use as a factor any voluntary waiver in determining whether to charge the assertion of the privilege.<sup>214</sup> It allowed any organization to make a “voluntary and unsolicited offer to share the internal investigation materials of the organization.”<sup>215</sup> Despite the saber-rattling, it appears that Senator Specter’s purpose was to find an issue (“prosecutorial abuse” of the “fundamental” attorney-client privilege) to spotlight as he moved from Chairman to Ranking Member of the Senate Judiciary Committee, not to push legislation through Congress.

And Specter’s bill was exactly what the ABA Task Force demanded. Less than a week later, the DOJ scrapped the Thompson Memorandum, replacing it with the McNulty Memorandum. The “Factors to be Considered” in the McNulty Memorandum differed in only

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December 7, 2006) (last visited July 31, 2008).

<sup>214</sup>*See* 152 Cong. Rec. S11439 (Dec. 7, 2006) (reprinting bill). *See also* <http://www.abanet.org/media/docs/acppa06.pdf> at 5-6 (last visited July 31, 2008). The bill did not state what if any consequences resulted if a prosecutor was found (one must assume a federal court made such a finding under some claim of prosecutorial abuse) to have violated its provisions. Was it dismissal of any indictment with prejudice? A Congressional directive to the executive to fire the government agent? The bill possesses serious separation of powers problems, for it involved congressional regulation of the executive’s “exclusive authority and absolute discretion to decide whether to prosecute a case.” *United States v. Nixon*, 418 U.S. 683, 693 (1974).

<sup>215</sup>*Id.* at 6.

one substantive respect from the Thompson Memorandum: Factor 4 of the McNulty Memorandum noted “the company’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents.”<sup>216</sup> It deleted from the Thompson Memorandum the remainder of Factor 4: “including, if necessary, the waiver of corporate attorney-client and work product protection.”<sup>217</sup> Section VII of the McNulty Memorandum included in subsection (2) a discussion of waiver of the attorney-corporate client privilege and the work product doctrine. The McNulty Memorandum permitted a government attorney to request a waiver if there existed a “legitimate need,” which was defined as:

- (1) the likelihood and degree to which the privileged information will benefit the government’s investigation;
- (2) whether the information sought can be obtained in a timely and complete fashion by using alternative means that do not require waiver;
- (3) the completeness of the voluntary disclosure already provided; and
- (4) the collateral consequences to a corporation of a waiver.<sup>218</sup>

The McNulty Memorandum divided waivers into two types, Category I and Category II. Category I waivers involved “purely factual information,”<sup>219</sup> some of which would not be

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<sup>216</sup>*Id.* at 4. *Cf.* Thompson Memorandum at 3.

<sup>217</sup>*See* Thompson Memorandum at 3.

<sup>218</sup>*See* McNulty Memorandum at 9.

<sup>219</sup>*See id.*

privileged. Even before seeking purely factual information, the United States Attorney was required to consult with the Assistant Attorney General for the Criminal Division. Both the request and any authorization by the United States Attorney for a Category I waiver was to be in writing. Category II information, which clearly required a waiver of the privilege or relinquishment of the protections of the work product doctrine, “should only be sought in rare circumstances” and only if the information gathered from a Category I request was insufficient to ensure a thorough investigation.<sup>220</sup> Category II information could be sought only after the Deputy Attorney General provided written authorization allowing the government to seek a waiver. An organization’s decision to refuse to waive its protections in Category II matters could not be used in making a charging decision, although a voluntary acquiescence could be considered favorably by prosecutors.<sup>221</sup> What did not meet the ABA’s demands or the Specter bill’s requirements was the McNulty Memorandum’s use of a corporation’s decision with regard to a Category I request: “A corporation’s response to the government’s request for waiver of privilege for Category I information may be considered in determining whether a corporation has cooperated in the government’s investigation.”<sup>222</sup>

Specter filed the same bill in the new Congress on January 4, 2007.<sup>223</sup> After hearings in

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<sup>220</sup>*See id.* at 10.

<sup>221</sup>*See id.*

<sup>222</sup>*See id.* at 9.

<sup>223</sup>S. 183, *available at*

the House in March and in the Senate in September, a companion bill in the House passed in November 2007.<sup>224</sup> As congressional pressure on the DOJ increased, the ABA raised the stakes. In a 16-page statement to the Senate Judiciary Committee during a hearing in September 2007,<sup>225</sup> the ABA counted the many ways in which the McNulty Memorandum was flawed.<sup>226</sup> It again raised *Stein* and the unscientific survey of in-house counsel alleging a “culture of waiver” as evidence of the need for the adoption of the Specter bill. It offered as “new” evidence a letter

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visited July 31, 2008).

<sup>224</sup>H.R. 3013 was passed by the House on November 13, 2007. *See* 153 Cong. Rec. H13564 (Nov. 13, 2007). The bill is found at [http://www.abanet.org/poladv/priorities/privilegewaiver/2007nov13\\_hr3013\\_billtext.pdf](http://www.abanet.org/poladv/priorities/privilegewaiver/2007nov13_hr3013_billtext.pdf) (last visited July 31, 2008). *See also* <http://www.abanet.org/poladv/priorities/privilegewaiver/> (reporting passage of bill in House) (last visited July 31, 2008).

<sup>225</sup>This followed a similar 17-page statement from ABA President Karen J. Mathis to a subcommittee of the House Judiciary Committee at a hearing on March 8, 2007. *See Statement of Karen J. Mathis Concerning “The McNulty Memorandum’s Effect on the Right to Counsel in Corporate Investigations”*, available at [http://www.abanet.org/poladv/letters/attyclient/2007mar08\\_privwaivh\\_t.pdf](http://www.abanet.org/poladv/letters/attyclient/2007mar08_privwaivh_t.pdf) (last visited July 31, 2008).

<sup>226</sup>*See Statement of the American Bar Association to the Committee on Judiciary of the United States Senate*, available at [http://www.abanet.org/poladv/priorities/privilegewaiver/20070918\\_mcnulty.pdf](http://www.abanet.org/poladv/priorities/privilegewaiver/20070918_mcnulty.pdf) (last visited July 31, 2008).

from Norman Veasey, the former chair of the Ethics 2000 Commission.<sup>227</sup> The Veasey letter offered 12 “anecdotal” experiences of varying relevance, with Veasey himself acting as a “neutral” who had not “independently verified the accuracy of the underlying facts.”<sup>228</sup> Veasey did not explain why his letter, reporting rank hearsay concerning allegations about which he had no firsthand knowledge, should be persuasive. Not only had Veasey not verified the truth of these 12 claims of alleged prosecutorial abuse, those making claims of prosecutorial abuse hid under the cloak of anonymity, for fear of “reprisals, and that public disclosure of these stories could further erode their clients’ ongoing relationships with prosecutors or enforcement officials with whom they must continue to work.”<sup>229</sup> Again, if government agents were truly that evil, engaging in retaliation upon innocents when their abuse of power was unmasked by lawyers for those innocents, weren’t lawyers duty-bound to make a principled stand by “speaking truth to power”? Anonymous claims of prosecutorial abuses allowed lawyers to play both sides of the street, cozying up to prosecutors when it fit their clients’ needs, and cozying up to legislators when that best protected their clients’ interests. For the ABA to rely on the anonymous claims

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<sup>227</sup>See Letter from Norman Veasey to Senate Judiciary Committee, September 13, 2007, available at <http://www.abanet.org/poladv/priorities/privilegewaiver/cjveaseyletter.pdf> (last visited July 31, 2008).

<sup>228</sup>See *id.* at 3.

<sup>229</sup>See *id.* If that’s the case, then why speak at all? For example, Veasey’s Case No. 9 noted that Judge T.S. Ellis III had ruled in the case, see Veasey Letter at 10, evidence specific enough for anyone to learn the identities of the non-profit corporation and government attorney involved in that matter.

made in the Veasey letter as evidence of prosecutorial abuse suggests the worst type of witch hunt. It was cowardly. Finally, six of the 12 anecdotal cases noted by Veasey were pre-McNulty cases, while only three arose after the McNulty Memorandum was issued (three began before McNulty and continued after McNulty was issued). How evidence of six cases involving a protocol no longer in effect was relevant to the operation of the McNulty Memorandum was not discussed by Veasey. Of the three arising after adoption of the McNulty Memorandum, one allegedly concerned prosecutorial overreaching, with the company “sticking to its guns” and refusing to waive to no apparent ill effect, the second claimed a “more subtle, but nonetheless palpable [sic]” pressure, and the third seemed based on company speculation of abusive prosecutorial motives designed to lessen the benefit given the company for self-reporting an EPA violation.<sup>230</sup> Veasey provided a numerator, 12, but failed to provide a denominator (was this 12 of 20 possible cases? 12 of 200 possible cases?), meaning the reader had no sense of the extent of the “problem” of prosecutorial abuse. Like the self-interested survey of in-house (and other interested) counsel claiming the government had instituted a “culture of waiver,” the evidence produced in the Veasey letter was fraught with evidentiary problems. It proved nothing but a desire for the ABA to appeal to the passion of the legislature. After all, “horror” stories of overzealous prosecutors (unnamed and unknown, but out there somewhere) were much more valuable to the legislative process than mere reason.

In November 2007, in a letter to all members of the House, which was readying a vote on the House version of the Specter bill, the ABA declared the McNulty Memorandum “pressures

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<sup>230</sup> *See id.* at 4-6.

companies and other organizations to waive their privileges as a condition for receiving cooperation credit, and hence leniency, during investigations.”<sup>231</sup> No evidence was offered to prove this claim, but none was needed. Of course corporations needed congressional protection; they cowered under the threat of prosecution from just about any governmental agent. But the attorney-corporate client privilege doesn’t sell that well to most people. Thus, the ABA letter quickly turned (as had the Task Force) from pressure on corporations to claiming the McNulty Memorandum attacked individuals and individual rights. In addition to pressuring corporations, the McNulty Memorandum incorporated policies that “violate employees’ Sixth Amendment right to counsel and Fifth Amendment right against self-incrimination by pressuring companies to not pay their employees’ legal fees during investigations, to fire the employees for not waiving their rights, or to take other punitive actions against them long before any guilt has been established.”<sup>232</sup> *Stein* was a fecund source for the ABA. Framing the McNulty Memorandum as inimical to individual rights allows the ABA to promote its opposition to the McNulty Memorandum in a way that minimizes the benefits a change will bring to corporations.

The Specter bill has been reintroduced in 2008, and, the ABA notes, the DOJ is expected

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<sup>231</sup>See Letter from William H. Neukom, ABA President to “Dear Representative,” November 7, 2007, *available at* [http://www.abanet.org/poladv/letters/attyclient/2007nov8\\_hr3013h\\_1.pdf](http://www.abanet.org/poladv/letters/attyclient/2007nov8_hr3013h_1.pdf) (last visited July 31, 2008).

<sup>232</sup>*Id.* at 1.

to alter or replace the McNulty Memorandum soon.<sup>233</sup> But now that the ABA is wholly on the offensive, even replacing the McNulty Memorandum is not enough, for “the new policy will not solve the larger problem of government-coerced waiver because it would not affect the similar waiver policies adopted by the SEC, the EPA, HUD, and numerous other agencies.”<sup>234</sup> The Enron scandal isn’t just history, it’s ancient, irrelevant history. That is, until the next corporate fraud crisis.

## V. CONCLUSION

The extent to which the lawyer’s duty of loyalty to a client bars the disclosure of client confidences reflects a philosophical dispute concerning the role of the lawyer in a democratic society. Whether a lawyer may disclose a client confidence to rectify a past fraud, or disclose a client confidence to prevent a future fraud if the lawyer’s services are not used to assist in the commission of the fraud present difficult questions. So too is the question whether the disclosure of client confidences by a lawyer should be made mandatory or permissive in specific circumstances. Thus, the dissonance within the ABA about how to resolve these issues since the

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<sup>233</sup>See *Independence of the Legal Profession: Attorney-Client Privilege, Work Product, and Employee Legal Protections*, available at <http://www.abanet.org/poladv/priorities/privilegewaiver/> (last visited July 31, 2008). See also Marcia Coyle, ‘McNulty Memo’ Triggers an Ultimatum, Nat’l L.J., July 7, 2008, at 6 (noting status of proposed bill).

<sup>234</sup>See *id.*



early 1950s speaks in great part to the truth that such issues present jurisprudential dilemmas.

Even the rejection of the Kutak Commission's proposed Model Rule 1.6 may be understood largely as a jurisprudential debate, although the debate lacked clarity, and some of the debaters seemed less concerned about policy and principle and more concerned about power. But the ABA's actions since its adoption of the Model Rules in 1983 on the issue of client confidentiality appear almost wholly based on preservation of its authority to speak on behalf of lawyers and to speak to lawyers. The rejection of the Ethics 2000 Commission's amendments to Model Rule 1.6 possessed more than a whiff of arrogance. When the ABA had to go on the defensive shortly thereafter due to the collapse of Enron, its Task Force on Corporate (not Lawyer) Responsibility proposed sweeping changes, changes that gave the appearance of acting in the public interest, but clearly offered in a focused effort to squelch congressional authorization to SEC of a power to regulate lawyer conduct. When that failed, the ABA managed to protect the system of lawyer self-regulation through a strategic retreat that left the SEC's regulations of lawyer conduct largely toothless, and put the ABA in a position in which self- and client-interest was trumpeted as public interest. Regaining the offensive, the ABA clothed in the garb of protecting individual rights its attacks on DOJ policy allowing its prosecutors to consider waiver of attorney-client privilege in determining whether to seek an indictment of a *corporation*. Again, the ABA used claims of public interest to protect the interests of corporations, most of them large and publicly traded. And these efforts to paint the DOJ and agencies of the government as attacking the attorney-corporate client privilege did not begun until the Holder Memorandum was five years old, and the SEC's Seaboard Report was three

years old.

It's unclear whether Santayana's famous saying, "Those who cannot remember the past are condemned to repeat it," is true, for many historical events are not closely analogous to current crises. Hewing too closely to a reading of history leads one to prepare for the last war rather than the next one. On the other hand, some events should be recent enough and close enough in time that Santayana's aphorism leaps readily to mind. Peter Fishbein was the Kaye, Scholer lawyer misled by the owners of O.P.M. and left in the dark by O.P.M.'s previous lawyers, Singer Hutner, in the O.P.M. scandal at the beginning of the 1980s. At the end off the decade he represented Lincoln Savings & Loan and for his professional conduct in that matter was in 1992 permanently barred from representing federally insured financial institutions by the OTS.<sup>235</sup> Shouldn't he have remembered? Judge Stanley Sporkin asked in 1990, in considering the Lincoln Savings and Loan scandal, "Where were the professionals? ... Where also were the

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<sup>235</sup>See Ted Schneyer, *From Self-Regulation to Bar Corporatism: What the S&L Crisis means for the Regulation of Lawyers*, 35 S. Tex. L. Rev. 639, 646 (1994), citing *In re Fishbein*, OTS AP-92 25 (March 11, 1992).

outside accountants and attorneys when these transactions were effectuated?”<sup>236</sup> After his lament, Judge Sporkin concluded, “One of the great attributes of this nation is it learns from its mistakes.”<sup>237</sup> Most Americans, optimists that they are, believe this will come to pass. Lawyers, either by training or inclination (or both), are less optimistic.

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<sup>236</sup>Lincoln Sav. & Loan Ass’n v. Wall, 743 F. Supp. 901, 920 (D.D.C. 1990).

<sup>237</sup>*Id.* at 921.

## **APPENDIX**

### **TIMELINE OF EVENTS**

1997—ABA creates Special Commission on Evaluation of the Rules of Professional Conduct (Ethics 2000 Commission)

June 16, 1999—Holder memorandum released by Department of Justice

March-April 2000-Dotcom bubble bursts, stock markets begin steep descent

November 2000—First Ethics 2000 report issued

June 2001—Final Report of Ethics 2000 issued; urges changes in Model Rule 1.6 on when client confidences may be disclosed, including permissible disclosure when client engaged in fraud

August 6-7, 2001—ABA House of Delegates adopts some Ethics 2000 proposals; rejects amendment to Model Rule 1.6 relating to disclosure when client has created financial harm to third persons

August 14, 2001—Jeffrey Skilling resigns as CEO of Enron

August 28, 2001—Wall Street Journal article reports improprieties at Enron

September 11, 2001—Attacks on World Trade Center, Pentagon and United 93

October 16, 2001—Enron reports \$600 million quarterly loss and loss of \$1.2 billion in shareholder value due to Special Purpose Entities (SPEs)

October 17, 2001—First Wall Street Journal report on multi-million dollar profit from SPEs by Enron CFO Andrew Fastow

October 23, 2001—SEC issues Seaboard Report

November 8, 2001—Enron restates financials for past 5 years

December 2, 2001—Enron files for bankruptcy

January 2002—Congressional hearings begin

January 28, 2002—Global Crossing files for bankruptcy

February 4, 2002—ABA Midyear meeting adopts most remaining Model Rule amendments

February 14, 2002—Republican Rep. Michael Oxley introduces bill to regulate accounting firms, and includes provision to study sufficiency of Model Rules as regulatory guide for lawyers

March 14, 2002—Indictment of Arthur Andersen, accounting and consulting firm for Enron, publicly filed (indictment dated March 7)

March 28, 2002—ABA creates Task Force on Corporate Responsibility

April 2002—WorldCom CEO Bernie Ebbers resigns under pressure

May 15, 2002—Adelphia CEO and Chairman of the Board John Rigas resigns under pressure

June 2002—Tyco CEO Dennis Kozlowski resigns

June 4, 2002—Kozlowski indicted by State of New York for tax avoidance

June 12, 2002—Tyco announces SEC will open investigation of it

June 15, 2002—Andersen convicted at trial (conviction reversed in Supreme Court, *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005))

June 17, 2002—Tyco files civil suit against former Chief Corporate Counsel Mark Belnick

June 25, 2002—WorldCom makes \$3.8 billion restatement of EBITDA

June 25, 2002—Adelphia files for chapter 11

June 25, 2002—Sen. Sarbanes files bill that will become Sarbanes-Oxley Act

July 9, 2002—President Bush issues executive order creating a Corporate Fraud Task Force in

the Department of Justice

July 15, 2002—§ 307 of Sarbanes-Oxley Act (Edwards amendment) unanimously adopted by Senate, which requires SEC to create rules of lawyer regulation for those appearing before it

July 16, 2002— Task Force on Corporate Responsibility issues preliminary report (later published at 58 Bus. Law. 145 (2002)) and suggests amendments to Model Rule 1.6 suggested by Ethics 2000 Committee be adopted, but made mandatory, not just permissible

July 21, 2002—WorldCom files for bankruptcy, largest ever

July 24, 2002—John Rigas and sons sued by SEC for fraud

July 25, 2002—Sarbanes-Oxley adopted by Congress

July 30, 2002—Sarbanes-Oxley signed into law

September 12, 2002—Kozlowski, former Tyco CFO Mark Swartz and former Tyco General Counsel Mark Belnick indicted (Belnick acquitted in July 2004)

September 23, 2002—John Rigas and two sons indicted by federal government

November 5, 2002—Harvey Pitt resigns as chairman of SEC

November 21, 2002—SEC issues Proposed Rules regulating lawyer conduct; does not mandate disclosures due to “noisy withdrawal” requirement

December 18, 2002—ABA offers comments on SEC Proposed Rules objecting to noisy withdrawal and other proposed rules

January 20, 2003—Thompson Memorandum released

January 23, 2003—Final rules of SEC pursuant to § 307 issued; SEC eliminates “noisy withdrawal” provision but keep disclosure of client confidences in fraud matters as discretionary not mandatory

March 31, 2003—Final Report of the Task Force on Corporate Responsibility issued; Report omits earlier decision to mandate disclosure and recommends ABA adopt amendments to Model Rule 1.6 to permit but not require disclosure

August 2003—By vote of 218-201 ABA adopts proposed amendments to Model Rule 1.6

Early 2004—Sentencing Commission proposes Commentary regarding effect of cooperation by waiving attorney-client privilege to sentencing guidelines

Spring 2004—Trial of Tyco executives Swartz and Kozlowski (mistrial; retried and convicted in 2005)

August 2004—ABA House of Delegates resolves that waiver of attorney-client privilege and work product should not affect sentencing

September 2004—ABA creates Task Force on Attorney-Client Privilege

November 2004—Sentencing Commission Commentary added regarding effect of waiver or non-waiver of attorney-client privilege

August 2005—ABA adopts recommendations of Task Force on Attorney-Client Privilege supporting Attorney-Client privilege

April 5, 2006—Sentencing Commission votes to remove provision on waiver of privilege

May 25, 2006—Kenneth Lay and Jeffrey Skilling convicted in federal court

June 26, 2006—District court holds Thompson memorandum providing that payment of employee's attorney fees would be considered lack of cooperation on part of employer, when consideration was being given to indicting employer, was violation of substantive due process rights of employees, and violated right to counsel, when government coerced KPMG into not paying attorney fees for accused, *United States v. Stein*, 435 F.Supp.2d 330 (S.D.N.Y. 2006)

August 2006—Task Force on Attorney-Client Privilege issues final report with strong language attacking Thompson memorandum and actions of government in KPMG case

September 12, 2006—Senate Judiciary Committee holds hearing on Thompson Memorandum

November 1, 2006—Sentencing Guidelines commentary on waiver of privilege is removed

November 7, 2006—off-year elections give control of both Houses of Congress to Democrats

December 7, 2006 —“Attorney-Client Privilege Protection Act of 2006,” informally introduced by Sen. Arlen Specter (R-PA), outgoing chairman of Senate Judiciary Committee

December 12, 2006—DOJ issues McNulty memorandum, which replaces Thompson and Holder Memorandums

January 4, 2007—Sen. Specter introduces Attorney-Client Privilege Protection Act

March 2007—Subcommittee of House Judiciary Committee holds hearing on McNulty Memorandum

July 12, 2007—Attorney-Client Privilege Protection Act of 2007 introduced in House

September 18, 2007—Senate Judiciary Committee holds hearing on Attorney-Client Privilege and McNulty Memorandum

November 13, 2007—House adopts its version of Attorney-Client Privilege Protection Act of 2007

June 27, 2008—Sen. Specter offers revised Attorney-Client Privilege Protection Act bill